

CASE

NUMBER:

99-218

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COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:

PETITION OF ICG TELECOM GROUP, INC.
FOR ARBITRATION OF AN INTERCONNECTION
AGREEMENT WITH BELLSOUTH TELECOM-
MUNICATIONS, INC. PURSUANT TO
SECTION 252(b) OF THE TELECOMMUNI-
CATIONS ACT OF 1996

CASE NO. 99-218

FILED

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1 CHAIRWOMAN HELTON:

2 Good morning. We're here in the matter of a Petition
3 by ICG Telecom Group, Inc., for arbitration of an
4 interconnection agreement with BellSouth Tele-
5 communications, Inc., pursuant to Section 252(b) of the
6 Telecommunications Act of 1996, which is Case No.
7 99-218. Could we have the appearances of the parties,
8 please?

9 MR. HATFIELD:

10 Good morning, Dr. Helton and Commissioners. I'm Kent
11 Hatfield with the firm of Middleton & Reutlinger, 2500
12 Brown and Williamson Tower, Louisville, Kentucky. My
13 colleague, Hank Alford, is here with me, and lead
14 counsel today for ICG will be Al Kramer, sitting to my
15 right. He's with the firm of Dickstein, Shapiro, Morin
16 & Oshinsky in Washington, 2101 L Street NW, Washington,
17 D.C. 20037-1526, and his colleague, Jacob Farber, is
18 also appearing for ICG today.

19 MR. MERSHON:

20 Madam Chairman, members of the Commission, I'm
21 Creighton Mershon representing BellSouth and, along
22 with me, my colleagues, Lisa Foshee and Langley
23 Kitchings, and we're at 601 West Chestnut, Louisville,
24 Kentucky 40203.
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CHAIRWOMAN HELTON:

Staff?

MS. DOUGHERTY:

Amy Dougherty for the Commission and staff.

CHAIRWOMAN HELTON:

Is there anyone else? Before we begin testimony, is there any member of the public that would like to give comments this morning? Hearing none, we will proceed.

MR. KRAMER:

Madam Chairman, we have one preliminary matter. ICG has voluntarily withdrawn the issue of volume and term discounts. So that issue is now moved from the proceeding.

CHAIRWOMAN HELTON:

Thank you. Does that mean that we'll have any witnesses that will not be appearing or be stipulated?

MR. KRAMER:

It does not. Excuse me, Madam Chairman. There are some portions of the testimony that address this issue, but they're now moot.

CHAIRWOMAN HELTON:

Okay. Thank you. If you would like to call your first witness.

MR. KRAMER:

Yes. Thank you. ICG calls, as its first witness,

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Bruce Holdridge.

WITNESS SWORN

The witness, BRUCE HOLDRIDGE, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you please state your name and address for the record?

A. Yes. My name is Bruce Holdridge, and my address is 180 Grand Avenue, Suite 800, in Oakland, California.

Q. And could you please give your title and your job responsibilities?

A. Yes. My title is Vice President of Government Affairs, and my responsibilities include the overall administration of existing and new interconnection agreements with Bell companies and independent telephone companies.

Q. Mr. Holdridge, did you cause to be prepared and submitted in this matter the direct testimony of Bruce Holdridge consisting of 13 pages?

A. Yes, sir.

Q. And, Mr. Holdridge, did you prepare or cause to be prepared the rebuttal testimony of Bruce Holdridge in this matter consisting of nine pages and one Exhibit?

A. Yes, sir.

1 Q. Mr. Holdridge, do you have any corrections to either of
2 your testimonies at this time?

3 A. Yes, I have corrections in my direct and my rebuttal
4 testimony. The first correction is on Page 3, Line 15,
5 where it says that I have testified before the North
6 Carolina Utilities Commission. That should be the
7 Georgia Public Service Commission. On Page 6, I would
8 like to delete or strike my testimony from Lines 16
9 through 20 and that proceeds on to Page 7, Lines 1
10 through 8. I would like to amend my testimony on Page
11 9, Line 2. The word "can" should be "cannot," and I
12 would like to amend my testimony on Line 18 so that it
13 reads, "ICG intends to use the EEL only" - instead of
14 "primarily" - "for offering its customers local
15 exchange service." I would like to delete the
16 following sentence, and I would like to add to the end
17 of the first sentence that "ICG intends to use the EEL
18 only for offering its customers local exchange service
19 until the FCC has a rule in effect in its further ..."

20 Q. Mr. Holdridge, could you go a little more slowly,
21 please?

22 A. I'm sorry; uh-huh. ". . . until the FCC has a rule in
23 effect in its further proceeding in the UNE remand
24 proceeding." One last minor correction is on Page 11,
25 Line 13. The word "establish" should be past tense,

1 "established."
2 Q. And in your rebuttal testimony?
3 A. Yes. In my rebuttal testimony on Page 5, I would like
4 to delete the testimony between Lines 7 through 23.
5 Q. Mr. Holdridge, as so corrected, if I asked you each of
6 the questions contained in your direct and rebuttal
7 testimony, would your answers be the same?
8 A. Yes, sir.
9 MR. KRAMER:
10 Madam Chairman, at this time, the witness is
11 tendered for cross, and I move the admission of
12 Mr. Holdridge's testimony and the attached
13 Exhibits.
14 CHAIRWOMAN HELTON:
15 So ordered. Ms. Foshee?
16 MS. FOSHEE:
17 Thank you.
18 CROSS EXAMINATION
19 BY MS. FOSHEE:
20 Q. Good morning, Mr. Holdridge.
21 A. Good morning, Ms. Foshee.
22 Q. I want to talk to you first a little bit about packet-
23 switching. Now, in Georgia, you told the Commission
24 that this issue was settled; correct?
25 A. Yes, ma'am.

1 Q. Okay. And, in Tennessee, you told the authority that
2 it was also settled; correct?

3 A. Yes, ma'am.

4 Q. And today I presume the issue is not settled; correct?

5 A. I don't believe that is correct. I believe that the
6 issue is settled.

7 Q. Okay.

8 MS. FOSHEE:

9 Is that an issue ICG wants to withdraw from this
10 proceeding?

11 MR. KRAMER:

12 No. We are not withdrawing the issue. We have
13 settled the issue. As Mr. Holdridge's rebuttal
14 testimony explains, we have accepted the pricing
15 proffered by BellSouth, and there is no longer any
16 issue in dispute, but we have not withdrawn the
17 issue.

18 Q. Mr. Holdridge, what is it that ICG wants this
19 Commission to decide with respect to packet-switching?

20 A. We would like to accept BellSouth's offer, and we would
21 like for the record to reflect that we have accepted
22 BellSouth's offer for their pricing as in Mr. Hendrix'
23 Exhibit.

24 Q. Okay. Thank you. We'll move on. Now, with respect to
25 the EEL, which I think is the second topic that you

1 discuss in your testimony, I think you'll agree with me
2 that the EEL is comprised of three elements: loop,
3 transport, and cross-connect.

4 MR. KRAMER:

5 Objection. As "elements" being used, it's a
6 technical phrase. It's a legal phrase.

7 MS. FOSHEE:

8 I asked the question how I asked it, Mr. Kramer.
9 I think the witness is entitled to answer.

10 CHAIRWOMAN HELTON:

11 Answer, please.

12 A. As I understand it, if the word "element" is being used
13 in a legal definition, there are two network elements
14 and that is a loop and a transport. We don't believe,
15 ICG does not take the position, that a cross-connect is
16 an element.

17 Q. Okay. Let me rephrase it. Can we agree that there are
18 three pieces to an EEL?

19 A. Yes, ma'am.

20 Q. Okay. And, to form the EEL, those three pieces need to
21 be combined; correct?

22 A. The loop must be tied together with the transport using
23 the cross-connect; yes.

24 Q. Okay. And I think that you understand that the FCC has
25 declined in its recent 319 Order to make the EEL a

1 separate UNE; correct?

2 A. No, I don't agree with that. I believe that the FCC
3 has clearly mandated that, where EELs or combined
4 facilities exist in the BellSouth network, that they
5 have mandated BellSouth make those existing facilities
6 available to CLECs such as ICG, and BellSouth has
7 combined facilities in their network. They use them
8 for ISDN services in an ANSA environment as described
9 in the general subscribers tariff in Kentucky, ANSA
10 standing for alternate network serving arrangement.
11 BellSouth uses them for foreign exchange type services.
12 BellSouth further uses them for private line services
13 for access to packet-switching services and may even
14 use them for off prem extension type applications to a
15 PBX service. So, no, I would not agree. I think that
16 existing facilities have been clearly mandated to be
17 made available to CLECs.

18 Q. Okay. Well, let me see if I can draw a distinction
19 here. Setting aside the currently combined issue,
20 which we'll get to in a minute, is it your position
21 that the EEL is on the FCC's list of UNES?

22 A. No. It is my position that the list is not exhaustive;
23 it's subject to change; and that the FCC has not yet
24 made a decision on the EEL as part of that list.

25 Q. Okay. Let's try it one more time. Is the EEL on the

- 1 FCC's current list of UNES?
- 2 A. It is not on the current list of UNES because it has
3 not been decided by the FCC.
- 4 Q. Okay. So, given that it's not on the current list of
5 UNES, you're asking this Commission to do something
6 other than what the FCC has determined?
- 7 A. Well, no. We are asking right now that this Commission
8 mandate to ICG that they give us the existing
9 facilities, the existing combined network elements,
10 that BellSouth uses today in their network, subject to
11 further testimony by Ms. Schonhaut who can give you
12 legal opinions as to where ICG's position is on the
13 EEL, both for existing facilities as well as to be
14 decided by the FCC and new combined facilities. Ms.
15 Schonhaut can answer that question.
- 16 Q. Okay. Well, I don't want to put words in your mouth,
17 but it sounds to me like what you're saying, then, is
18 that all you're asking this Commission to do is to
19 order BellSouth essentially to do what the FCC has
20 ordered BellSouth to do.
- 21 A. Until the FCC rules further, that's correct.
- 22 Q. Okay. Now, in Georgia, I think you told me that the
23 ICG would use the EEL to provide special access;
24 correct?
- 25 A. That's correct.

1 Q. Okay.

2 A. ICG has amended its position on that. ICG will not use
3 special access via the EEL until the FCC has ruled
4 further, and we will limit the application to local
5 exchange service only.

6 Q. Okay. Can you agree with me, Mr. Holdridge, that
7 BellSouth has no obligation to combine UNES on behalf
8 of CLECs?

9 A. No, absolutely not. I cannot agree with that. I do
10 believe that BellSouth does have the obligation to
11 combine facilities especially where they are existing,
12 and I believe that that's clearly stated.

13 Q. Okay. I want to explore that view with you quickly
14 through two hypotheticals. The first is let's assume
15 that nowhere in BellSouth's network is a loop and a
16 transport facility combined. In that scenario, ICG
17 wants to order a loop/transport combination. Is it
18 ICG's position that, in that case, BellSouth is
19 obligated to provide ICG with a loop/transport
20 combination?

21 MR. KRAMER:
22 Objection. Are you asking for a legal conclusion
23 when you say "obligated"?

24 MS. FOSHEE:
25 No.

1 MR. KRAMER:
2 Okay.
3 A. Where existing facilities are currently combined, it is
4 BellSouth's obligation to provide those facilities.
5 Q. Okay. Well, I'm not sure that answered my question.
6 A. Okay. I'm sorry.
7 Q. In this scenario, okay, and the scenario is that,
8 assume that nowhere in BellSouth's network is a loop
9 and a transport combined and ICG orders a loop/
10 transport combination from BellSouth, is it ICG's
11 position that, in that situation, BellSouth is
12 obligated to provide ICG with that loop/transport
13 combination?
14 A. I believe that your hypothetical is unrealistic. At
15 the same time, I believe that it is subject to a
16 further decision by the Commission if you're talking
17 about no combinations existing today.
18 Q. Okay. Well, as unrealistic as it may be, and it may
19 be, I still don't think you've answered the question.
20 I'm trying to find out ICG's position as to whether
21 BellSouth would have to provide a loop/transport
22 combination to ICG in that hypothetical world.
23 A. In the hypothetical . . .
24 MR. KRAMER:
25 Asked and answered. Objection. It has been asked

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and answered.

CHAIRWOMAN HELTON:

She did ask the hypothetical, and I don't believe he answered, because she did say it was not available. So could you answer it in terms of if it were not available?

A. If it were not available anywhere in BellSouth's network, I believe that BellSouth should be required to give it to ICG.

Q. Okay. And, in the second hypothetical, let's assume BellSouth's existing network. There's a new customer who lives in a new subdivision and does not have existing BellSouth service. ICG wants to serve that customer with a loop/port combination. Is it ICG's position that, in that scenario, BellSouth is obligated to provide ICG with a loop/port combination?

A. I'm unsure of the hypothetical only because ICG would not require the port combination. We are a facilities-based provider, and we use our own switches. So the hypothetical doesn't apply to ICG in that we don't ask for the port.

Q. Okay. Just humor me and let's assume a situation where ICG is asking for a loop/port combination.

A. Okay. Could you restate the hypothetical? I'm sorry.

Q. Absolutely. Absolutely. A new customer lives in a new

1 subdivision. No existing BellSouth service to that
2 customer.

3 A. Right.

4 Q. ICG wants, in a hypothetical world, a loop/port
5 combination to serve that customer. Is it ICG's
6 position that BellSouth is obligated to provide ICG
7 with that loop/port combination?

8 A. Seeking clarification, . . .

9 Q. Yes, sir.

10 A. . . . I would assume that your hypothetical does not
11 have any existing facility in place.

12 Q. Correct. New customer, new subdivision.

13 A. Until the FCC rules further, I would say, yes, it is
14 ICG's position that it should be provided by BellSouth.

15 Q. Okay. Mr. Holdridge, can you agree with me that
16 BellSouth has no obligation to combine UNEs in the
17 parties' current agreement?

18 A. In the parties' current agreement, I can't agree with
19 that. However, I would like to add that BellSouth does
20 have that obligation in other interconnection
21 agreements. I believe that BellSouth offers that
22 obligation in an interconnection agreement with ITC
23 DeltaCom and with Intermedia. We're asking for the
24 same thing. I know that enhanced extended links are
25 also made available in other jurisdictions, such as in

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the State of California by Pacific Bell and in the State of Texas by Southwestern Bell.

Q. But, in your agreement, there's no obligation; correct?

A. In our current agreement, there is no current obligation; that's correct.

Q. Okay. Now, Mr. Holdridge, you make the argument in your testimony that - I think you argue that, without the EEL as a UNE, ICG is going to be forced to collocate in every BellSouth central office.

A. Yes, that's correct.

Q. Okay. You understand that the resale provisions of the Act are available to ICG to provide service in those situations; do you not?

A. I do understand that. However, I would like to add that - first of all, to directly answer your question, resale is not an economically viable opportunity for facilities-based carriers, such as ICG, and I say that because there is an extreme financial burden involved with it. There's also a great deal of administrative responsibility for it, and also, in a resale environment, customers are put through a great deal of stress, and what I mean is, when they have to convert the service off of the resale environment and onto the on-network facility, we actually have to take that customer out of service and that is disruptive to the

1 customer and their business and is disruptive to ICG's
2 business practice, and it's difficult.

3 Q. Okay. Well, let's go back a little bit. You can agree
4 with me that resale was designed, at least in part, to
5 allow new entrants to serve customers in situations in
6 which it wouldn't be economically feasible to deploy
7 facilities; correct?

8 A. I believe that that's what the FCC intended back in
9 1996 and that that was the intent. However, things
10 have changed tremendously since then as very often
11 resale-based facility providers are not given support
12 money and private capital from Wall Street or private
13 venture capitalists, and, although there may be many
14 resellers out there in the market existing today, they
15 may not be financially viable. They may not be making
16 a profit and may be under a different existence than
17 what ICG is and may be out there just to be acquired by
18 other providers, and so they may have a different
19 business plan. I also feel that the FCC wasn't taking
20 into consideration in a resale environment that, in
21 order to do collocation, you're using up central office
22 floor space which is more and more becoming a very
23 precious commodity, and, by using the EEL, you would
24 not have to use that central office floor space, and it
25 could be preserved for future collocation activity.

1 Q. Mr. Holdridge, is ICG making a profit today?
2 A. You know, I don't know.
3 MR. KRAMER:
4 Objection. There is a company witness who will be
5 prepared to address that issue.
6 MS. FOSHEE:
7 I think I'm entitled to ask him the question. He
8 answered he didn't know. That's fine.
9 A. Yeah. I don't know. The person who would be best to
10 answer that question would be the witness Ms.
11 Schonhaut.
12 Q. Okay. Mr. Holdridge, are you aware that there are
13 operational resellers running businesses in Kentucky
14 today?
15 A. I'm not aware of any, but I'm sure that there may be
16 some. I don't know about their financial viability or
17 what their business plan or strategy is, and it may
18 differ greatly from ICG's.
19 Q. Does ICG serve residential customers in Kentucky?
20 A. No, we do not currently serve residential customers in
21 Kentucky, but the EEL would certainly help us get
22 closer to serving that market, including small
23 businesses, businesses that have nine lines or less.
24 That would be a major use of the EEL.
25 Q. Do you have any specific business plans to serve

1 residential customers in Kentucky?

2 MR. KRAMER:

3 Objection. Business plans are proprietary. If
4 you want . . .

5 CHAIRWOMAN HELTON:

6 Mr. Kramer, we've had several questions about
7 business plans in all of the arbitrations that we
8 have had, and I would like for the witness to
9 answer.

10 MR. KRAMER:

11 All right.

12 A. ICG would certainly like to serve all customers that
13 want their service, including residence, small
14 business, large business, ISPs, IXCs, etc., and ICG
15 would be willing to further analyze the ability to
16 serve the residential market, but we would need the EEL
17 in order to do that. It would certainly make it a much
18 more available opportunity to ICG. At the same time,
19 we would still need to do some analysis on that market,
20 but, without it, we certainly cannot get closer to
21 serving the residential market if we are not provided
22 the EEL.

23 Q. But the answer is, I assume, no. You don't have any
24 business plans today to serve residential customers?

25 A. Well, I don't know. I believe that Ms. Schonhaut could

1 answer the specifics to the business plan, and I will
2 leave that to her to answer.
3 Q. Okay. Let's talk for a minute about performance
4 penalties that you talk about in your testimony.
5 A. Okay.
6 Q. On Page 12 of your direct, Lines 13 and 14 - let me
7 know when you get there.
8 A. Sure. Yes, ma'am.
9 Q. You state that, ". . . given BellSouth's behavior since
10 the passage of the Act, the incentive of entering the
11 long distance market has not been sufficiently strong
12 for BellSouth to provide an adequate level of service
13 to competitive carriers." Is that your testimony?
14 A. Yes, ma'am, that's correct; it is.
15 Q. Okay. Now, Mr. Holdridge, you didn't attach any
16 performance data to your testimony to support this
17 allegation; did you?
18 A. No, I have not. This issue will be considerably
19 addressed by witness Rowling later in this proceeding.
20 Q. Okay. But you didn't attach any performance data?
21 A. No, ma'am, I did not.
22 Q. Okay. Are you familiar with the PMAP system, Mr.
23 Holdridge?
24 A. I'm familiar with the acronym through previous
25 proceedings, but I have not gone on to the BellSouth

1 web site and looked at that information. I believe Ms.
2 Rowling has.
3 Q. Okay. So you understand, though, that that's the web
4 site of the performance measurements analysis platform?
5 That's the web site on which BellSouth posts
6 performance data for carriers, such as ICG?
7 A. Yes, ma'am, I am aware of that.
8 Q. Okay. And you've never looked at that data for
9 Kentucky?
10 A. No, I have not. I know that we've had trouble
11 accessing that site as the password we were given by
12 BellSouth was inaccurate and wouldn't work, but, again,
13 the person who looked at that specifically was Ms.
14 Rowling.
15 Q. Okay. But despite this allegation in your testimony,
16 you weren't that person; correct?
17 A. I'm not that person what? I'm sorry; I don't
18 understand.
19 Q. Who looked at the data.
20 A. No, I did not look at the data; that's correct.
21 Q. Okay. Now, with respect to the performance measure-
22 ments that you address in your testimony, I just want
23 to make sure I have this right. In North Carolina, ICG
24 changed its proposal and, at the hearing, asked for a
25 generic docket on these issues; correct?

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MR. KRAMER:

Madam Chairman, if I might, Ms. Schonhaut who is in charge of all the regulatory responsibilities will be testifying and a lot of these questions it will just ease things if we just hold them until she's on the stand, and she'll be happy to answer all of them.

MS. FOSHEE:

Dr. Helton, with all due respect, this witness has testified about these things, and it's in his testimony, and I think I'm entitled to ask him the questions.

CHAIRWOMAN HELTON:

Did you participate in the North Carolina proceeding?

A. No, ma'am, I did not.

MS. FOSHEE:

Okay. I'll move on.

Q. Did you participate in the Alabama proceeding?

A. Yes, ma'am, I did.

Q. Okay. And, in that proceeding, ICG withdrew the issue of performance measurements and penalties from consideration; did it not?

A. I believe it did.

Q. Okay. Did you participate in the Florida proceeding?

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A. I did.

Q. Okay. And, in that proceeding, the Florida Commission threw the issue out on the grounds that it didn't have authority to award penalties; correct?

A. You know, I don't know. This really is a question and a subject matter that should be addressed by either Ms. Schonhaut or Ms. Rowling. My testimony on performance measures directly relates to my operational experience as the Vice President and General Manager for the Northern California Region, and I am aware as to what happens to customers and what ICG suffers when BellSouth does not meet performance measures and have no remedies in order to enforce those and that is what my testimony sponsors, and it's why we need these performance measures. We've had numerous network outages and problems with BellSouth throughout our six-state serving area. I know we've had problems in serving arrangements, delayed activities, problems in Birmingham in the Buckhead tandem, and the customer perceives that as being a problem of ICG when, in fact, it's a problem caused by BellSouth, and it causes us public harm, and it causes us financial impact without BellSouth having any responsibility or any recuperation to ICG, and so my testimony is to the operational side of things.

1 Q. Well, I guess I'm confused, Mr. Holdridge, because you
2 gave the speech to the Commission about all of these
3 issues but yet you're not the person who has looked at
4 the performance data. You don't want to testify about
5 the performance measurements. So, you know, I think we
6 need to answer my questions, or we need to limit your
7 answers to what you contend is in your testimony; okay?

8 MR. KRAMER:

9 Madam Chairman, I didn't hear a question. It
10 seems to me as though, if the witness needs
11 disciplining, the request should be made to the
12 Chair to discipline the witness. It's not for Ms.
13 Foshee to lecture the witness.

14 MS. FOSHEE:

15 I'll move on with another question.

16 CHAIRWOMAN HELTON:

17 Thank you.

18 Q. You talk some about penalties in your testimony and the
19 need for penalties. Have you reviewed ICG's penalty
20 proposal in this matter?

21 A. Yes. ICG proposed to BellSouth, during our
22 negotiations, penalty measures in our performance
23 measures in that general negotiation, and we did ask
24 for liquidated damages in that. BellSouth denied that
25 and denied various other activity on performance

1 measures and would not offer anything except under 271
2 application at the FCC.

3 Q. Okay. So I presume, given your testimony in here about
4 the support that you give to performance penalties,
5 that you are supporting, in fact, the proposal that ICG
6 is making in this proceeding; correct?

7 A. That was our initial position in . . .

8 MR. KRAMER:

9 Objection. I'm sorry. When you say "You are
10 supporting ICG's position," are you asking Mr.
11 Holdridge personally or are you asking - I'm not
12 sure I know what the question means.

13 Q. Mr. Holdridge, are the penalties that you say are
14 necessary, in your testimony, the same penalties that
15 ICG is proposing that this Commission adopt?

16 A. No. The testimony that I have here was related to our
17 proposal in negotiations. For the actual penalties
18 that ICG is proposing, Ms. Rowling and Ms. Schonhaut
19 can specifically address the exact line item issues of
20 those penalties.

21 Q. Okay. So the penalties that you're saying are
22 necessary, in your testimony, are not the same ones
23 that this Commission is being asked to adopt?

24 A. No. I disagree with you. They are the same ones under
25 liquidated damages and general provisions of that

1 course and remedy.

2 Q. Okay. Okay. Now, with respect to those "liquidated

3 damages," did ICG do any cost study to support the

4 amounts of those liquidated damages?

5 A. I don't know.

6 Q. Okay. And do you know if those liquidated damages

7 amounts have any relationship to actual damages that

8 ICG might suffer?

9 A. I'm sorry. Could you repeat the question?

10 Q. Absolutely. The liquidated damages provision in ICG's

11 proposal, do you know if the amount of those liquidated

12 damages have any relationship to any actual damage that

13 ICG might suffer?

14 MR. KRAMER:

15 Madam Chairman, again, there is a performance

16 measures witness. There is a subject matter

17 expert who will be testifying on this issue. Ms.

18 Foshee is aware of that. I'm not sure why she's

19 hammering this witness and why we're going through

20 that. There is a legal witness. There is a

21 subject matter expert in this area. It would

22 certainly facilitate things and contribute to a

23 better, fuller record if the questions were asked

24 of the witnesses who are the subject matter

25 experts.

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CHAIRWOMAN HELTON:

Mr. Holdridge, when you testify to liquidated damages, you are testifying in a generic term?

A. Yes, ma'am.

CHAIRWOMAN HELTON:

I think that satisfies it.

MS. FOSHEE:

Okay.

CHAIRWOMAN HELTON:

Go on.

Q. Now, I think, in your testimony at Page 12, Line 19 - Page 12 of your direct, sir, . . .

A. Of my direct?

Q. Yes, sir.

A. Yes. Line 19?

Q. Yes, sir.

A. Yes.

Q. You state that, in a generic sense, liquidated damages are appropriate or liquidated damages and/or penalties are appropriate because they'll provide a incentive to BellSouth to perform; is that your testimony?

A. And it goes on to say ". . . its obligations in a satisfactory manner"; yes, ma'am.

Q. Okay. And that incentive is going to stem from the fact that BellSouth will be financially punished if it

1 fails to perform in some way; correct?

2 MR. KRAMER:

3 Madam Chairman, I'm going to raise the same
4 objection.

5 MS. FOSHEE:

6 Dr. Helton, I'm trying to abide by your ruling,
7 but that is directly out of his testimony.

8 CHAIRWOMAN HELTON:

9 And we have read it, and you can ask him if that's
10 what he said, but we have read the testimony. So
11 that is what you said in your testimony; correct?

12 A. Yes, ma'am.

13 CHAIRWOMAN HELTON:

14 Okay. Now, what are you asking him?

15 MS. FOSHEE:

16 Ma'am, I was asking if, by "incentive," he
17 understands that the incentive is going to stem
18 from the fact that BellSouth will be financially
19 punished if it fails to perform, if that's his
20 meaning of incentive, if that's where the
21 incentive is going to derive.

22 CHAIRWOMAN HELTON:

23 Would you answer the question, please?

24 A. Yes, that's correct.

25 Q. Okay. Thank you. Mr. Holdridge, one last question

1 before I confer with co-counsel. On Page 13 of your
2 direct, Lines 8 and 9, you mention BellSouth's Proposal
3 for Self-Effectuating Enforcement Measures.

4 A. You know, is it appropriate for me to step back to
5 answer that question and just say that I don't know? I
6 really feel that that is the more accurate answer for
7 me to say I don't know and that really Ms. Schonhaut
8 and Ms. Rowling can most directly answer that question.

9 CHAIRWOMAN HELTON:

10 The previous question about incentive?

11 A. Yes, ma'am.

12 Q. So you don't know what you meant when you put that in
13 your testimony?

14 A. That's correct.

15 Q. Okay. If you can look at Page 13 of your direct, Lines
16 8 and 9, I believe that's where you talk about
17 BellSouth's Proposal for Self-Effectuating Enforcement
18 Measures.

19 A. Yes.

20 Q. Okay. In what context did BellSouth make that proposal
21 to the FCC?

22 A. It was tied to their 271 application for long distance
23 authority in region, and I remember, during our
24 negotiations, that BellSouth would not grant any
25 performance measurements or any remedies without first

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receiving in-region long distance authority and that was the position that they've maintained throughout these proceedings in the various six states that we've been in, and there would be no further discussion by BellSouth on this issue nor any further negotiation.

MS. FOSHEE:

Dr. Helton, if I could have one minute to confer with co-counsel, I think I may be done.

CHAIRWOMAN HELTON:

Sure.

MS. FOSHEE:

Thank you. Thank you. We have no more cross examination.

CHAIRWOMAN HELTON:

Thank you. Ms. Dougherty?

MS. DOUGHERTY:

We have no questions.

CHAIRWOMAN HELTON:

Redirect?

MR. KRAMER:

Please.

REDIRECT EXAMINATION

1
2 BY MR. KRAMER:

3 Q. Mr. Holdridge, I want to try to clarify some of your
4 testimony. Do you recall that Ms. Foshee asked you
5 whether we are asking the Commission to order BellSouth
6 to provide combinations of facilities that are not
7 currently combined?

8 A. Yes, I remember that.

9 Q. Do you recall that? Do you recall that you answered,
10 "We are not asking them to do that"?

11 A. I believe so; yes.

12 Q. Okay. Now, Mr. Holdridge, isn't it accurate that there
13 are going to be situations where ICG will, in fact, ask
14 BellSouth to combine?

15 A. Yes, that is, in fact, the case.

16 Q. All right. Now, you also stated that - well, let me
17 withdraw that question. Do you remember Ms. Foshee
18 asked you about the withdrawal of the performance
19 measures issue in Alabama?

20 A. Yes, sir, I recall.

21 Q. Are you aware of whether or not that was part of any
22 kind of settlement of other issues with BellSouth?

23 A. Yes, I believe it was.

24 Q. Do you know?

25 A. Yes, it was.

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MR. KRAMER:

Okay. I have nothing further.

CHAIRWOMAN HELTON:

Recross?

RE CROSS EXAMINATION

BY MS. FOSHEE:

Q. Mr. Holdridge, are you confident in your answer that ICG withdrew its performance measures issue as part of a settlement?

A. In Alabama?

Q. Yes, sir.

A. Yes, I am. I believe that there were negotiations going on throughout North Carolina and Alabama.

MS. FOSHEE:

Okay. No further questions. Thank you.

CHAIRWOMAN HELTON:

You may be excused. Commissioner Holmes, do you have questions.

VICE CHAIRMAN HOLMES:

No.

CHAIRWOMAN HELTON:

Commissioner Gillis? You may be excused.

A. Thank you.

CHAIRWOMAN HELTON:

Mr. Kramer, next witness?

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MR. KRAMER:

I'm sorry, Madam Chairman. Thank you. I'm sorry.
The next witness is Phil Jenkins.

WITNESS SWORN

CHAIRWOMAN HELTON:

Proceed.

The witness, PHILIP W. JENKINS, after having been
first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you please state your name and address for the
record?

A. My name is Philip W. Jenkins. My work address is 50
Glenlake Parkway, Suite 500, Atlanta, Georgia 30328.

Q. And could you just give your title with ICG and
describe your responsibilities?

A. My title is Senior Director of Engineering and
Operations for the Southeast Region, and my
responsibilities include the design and implementation
of ICG's networks in the Southeast Region of the
country.

Q. And, Mr. Jenkins, did you prepare or cause to be
prepared the direct testimony of Philip Jenkins in this
proceeding consisting of five pages?

A. I did.

1 Q. And did you prepare or cause to be prepared the
2 rebuttal testimony of Philip Jenkins consisting of
3 three pages?
4 A. Yes, I did.
5 Q. And, Mr. Jenkins, do you have any corrections to either
6 of your testimonies?
7 A. Yes, I do. On my direct testimony, I ask to strike
8 Lines 18 through 32 from the direct testimony.
9 Q. I'm sorry?
10 A. That can be found on Pages 4 and 5.
11 Q. Mr. Jenkins, just to clarify, you mean Lines 18 to 22
12 on Page 4 and Lines 1 to 32 on Page 5?
13 A. Correct.
14 Q. All right. As so corrected, if I asked you each of the
15 questions contained in your direct and rebuttal
16 testimony, would your answers be the same today as they
17 are in the prefiled testimony?
18 A. Yes, they would.
19 MR. KRAMER:
20 Madam Chairman, at this time, I move the admission
21 of Mr. Jenkins' testimony, and the witness is
22 tendered for cross.
23 VICE CHAIRMAN HOLMES:
24 So ordered. Ms. Foshee?
25

1 MS. FOSHEE:

2 Thank you.

3 CROSS EXAMINATION

4 BY MS. FOSHEE:

5 Q. Good morning, Mr. Jenkins.

6 A. Good morning, Ms. Foshee.

7 Q. Will you agree with me that there is no obligation in
8 Section 251 or 252 of the Act for BellSouth to provide
9 these binding forecasts to ICG?

10 A. Yes, I would agree that there is no obligation.
11 However, the purpose of the binding forecasts is to
12 ensure quality service to the end user. The entire
13 purpose of the 1996 Telecom Act is to foster
14 competition. An integral part of making that
15 competition happen is providing quality services. ICG
16 is asking for an Order to implement this. Even though
17 it may not be explicitly called for in the Act, we're
18 asking for this Commission to order that it be put in
19 place.

20 Q. Okay. And there's no obligation in the parties'
21 current agreement to provide binding forecasts;
22 correct?

23 A. Not to my knowledge; no.

24 Q. Okay. Now, as I understand your proposal, ICG would
25 commit to a certain number of trunks and, if the

1 traffic volume falls short of the forecast, ICG would
2 pay BellSouth what you call its full cost of the unused
3 trunks; correct?

4 MR. KRAMER:

5 Go ahead, Mr. . . .

6 A. The term would better be served by "rate," assuming
7 that BellSouth's rate for those trunks recuperates our
8 costs.

9 Q. Okay. So let's see. I think, in your testimony, you
10 refer to the full cost, and you would like to change
11 that to the rate for those trunks; is that correct? I
12 believe, if you would like to refer, it's on Page 2 of
13 your rebuttal testimony, Lines 15 and 16. It says,
14 ". . . ICG will pay BellSouth its full cost for the
15 unused trunks." Do we need to amend that?

16 A. We can call it "rates." Yes, I am in agreement with
17 that.

18 Q. That it should be rates as opposed to costs?

19 A. Yes.

20 Q. Okay. Let me give you a hypothetical real quick, Mr.
21 Jenkins. Let's say we have an ICG forecast, a forecast
22 for a trunk group in Frankfort, and ICG says that that
23 trunk group is going to be fully utilized in two years
24 and let's assume that it costs \$500 to build the trunk
25 group and then it costs \$250 a year to maintain the

1 trunk group. So, at the end of those two years, we're
2 at \$1,000. Are you with me?
3 A. Yes, I am.
4 Q. Okay. If, at the end of those two years, ICG does not
5 use the trunk group, will ICG write BellSouth a check
6 for \$1,000?
7 A. No. ICG's proposal follows in term with what we are
8 presently doing. Presently, ICG provides BellSouth
9 with quarterly forecasts. Every three months we come
10 out with a forecast that will reflect if we are going
11 to need additional trunks for many small users that we
12 may be anticipating coming on line or even if you're a
13 big user, such as a call center. ICG's proposal would
14 look out three months. We would be willing, in certain
15 cases, to offer up the binding forecast and, at that
16 point in time, we would pay BellSouth a monthly rate
17 for the trunks that are not in service. As those
18 trunks go into service, ICG would cease to pay for
19 them. The trunks presently for DEOTS, for direct end
20 office trunking systems, those trunks are BellSouth's
21 responsibility to provide us with that service.
22 BellSouth pays for those. All ICG is asking for is to
23 have the requisite capacity available, and we're
24 confident that our forecasts are correct, and
25 therefore, at that point in time, we would be willing

- 1 to pay for those trunks that are unused if our
2 forecasts fall short.
- 3 Q. Okay. So the answer to my question is, no, ICG would
4 not pay BellSouth that \$1,000 of cost? It would pay
5 BellSouth the rate for those trunks?
- 6 A. On a monthly rate, we would pay the - we would
7 compensate BellSouth on a monthly basis for those
8 trunks not used.
- 9 Q. Okay. And so what ICG is proposing is that BellSouth
10 will incur the costs of provisioning those trunks on
11 the front end and maintaining the trunks through the
12 life of the trunk and, at some point, if ICG doesn't
13 use those trunks, ICG will pay BellSouth a monthly rate
14 for those trunks; is that correct?
- 15 A. Yes. ICG would pay - let me clarify. ICG would pay
16 BellSouth for the trunks not used commencing on the due
17 date that ICG says that they're needed.
- 18 Q. Okay. But BellSouth will incur the costs of
19 provisioning those trunks on day one; correct?
- 20 A. Yes, but that's no different than BellSouth selling any
21 service.
- 22 Q. Okay. Now, with respect to the testimony that you just
23 withdrew, I assume the reason that you withdrew that
24 testimony is that it wasn't correct; true?
- 25 A. Let me go to the testimony.

1 Q. Sure. Page 4, Lines 18 through 22 and Page 5, Lines 1
2 through 32.

3 CHAIRWOMAN HELTON:

4 Thank you.

5 MR. KRAMER:

6 Could I have the question repeated, please?

7 CHAIRWOMAN HELTON:

8 Ms. Sewell?

9 MS. FOSHEE:

10 Actually, I could just ask the question again to
11 speed things along.

12 CHAIRWOMAN HELTON:

13 Okay.

14 A. Please.

15 Q. Mr. Holdridge, the reason that you withdrew that
16 testimony is that it's not true; isn't that correct?

17 A. Mr. . . .

18 MR. KRAMER:

19 I'm going to object. The testimony is withdrawn,
20 and we're asking questions about the testimony.

21 MS. FOSHEE:

22 I think that, you know, presumably, when the
23 witness signed and submitted this testimony, he
24 thought it was true. It's a statement against
25 interest, and I'm entitled to ask him about it.

1 The panel has read the testimony, and I want it
2 clear on the record as to why it has been
3 withdrawn.

4 MR. KRAMER:

5 Well, I believe the witness has withdrawn the
6 testimony and now beginning to cross him on the
7 testimony is not proper. It's not in the record.

8 CHAIRWOMAN HELTON:

9 Mr. Kramer, we have read the testimony. It was
10 just withdrawn this morning. We would like to
11 hear his answer as to why it was withdrawn.

12 MR. KRAMER:

13 All right.

14 A. First of all, the name is Mr. Jenkins.

15 Q. Oh, I'm sorry, sir. I'm sorry. That's my fault.

16 A. To answer the question, I do not agree with the section
17 on binding traffic forecasts. The reason that I don't
18 agree is that it refers to the forecast provider and
19 the forecast recipient negotiating further what they
20 are going to do under these terms. ICG feels that we
21 are beyond the negotiation point, and we're ready for
22 an Order to make this happen. This is a take-or-pay
23 arrangement. ICG is willing to assume the risk
24 involved if we fall short of our forecast. BellSouth
25 would be left whole. We would not be asking BellSouth

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to take any risk. The benefit is entirely 100 percent to the customer, to the end user.

Q. Okay. And I think that you answered my question, but, just to confirm for the Commission, your statement on Lines 20 and 21, where it says, ". . . in which BellSouth has agreed to binding forecasts with a CLEC," that's the part that's not entirely accurate, and I think that's evidenced by your answer, that what this provision on the next page does is obligate the parties to negotiate further; correct?

A. Correct.

Q. Okay.

A. The paragraphs that follow don't clearly show that BellSouth has agreed to the binding forecasts.

Q. Great. Okay. Thank you.

MS. FOSHEE:

If I could just have one minute. No further questions. Thank you.

CHAIRWOMAN HELTON:

Ms. Dougherty?

MS. DOUGHERTY:

No questions.

CHAIRWOMAN HELTON:

Thank you. Redirect?

1 MR. KRAMER:

2 Yes, just briefly, I think.

3 REDIRECT EXAMINATION

4 BY MR. KRAMER:

5 Q. Mr. Jenkins, just to clarify a point Ms. Foshee made,
6 if ICG gives BellSouth a forecast and says, "We want X
7 number of trunks on January 1," assuming we're far
8 enough ahead of the curve or the timeline, "and we're
9 going to need those trunks from that date forward," and
10 those trunks are not being used on January 1, would ICG
11 commence to pay the rate for those trunks immediately
12 on January 1?

13 A. Yes, they would.

14 Q. Would ICG delay, in any manner, until the end of some
15 subsequent period beginning to make payment at the rate
16 for those trunks? Would ICG delay payment?

17 A. No, we would not.

18 Q. Okay. Now, Mr. Jenkins, just to clarify, at the time
19 when you - I'm not talking about the deleted testimony.
20 Are you with me?

21 A. Okay.

22 Q. At the time when you inserted the deleted lines in your
23 testimony, did you believe that those obligated
24 BellSouth to provide binding forecasts?

25 A. That was my interpretation at the time.

1 Q. And was that interpretation subsequently clarified by
2 BellSouth? Did BellSouth clarify that it was not
3 intended to be a binding forecast provision for you?

4 A. In previous hearings, yes.

5 MR. KRAMER:

6 Okay. Thank you. Nothing further.

7 MS. FOSHEE:

8 No recross. Thank you.

9 CHAIRWOMAN HELTON:

10 Thank you. You may be dismissed. Mr. Kramer?

11 MR. KRAMER:

12 At this time, ICG calls Gwen Rowling.

13 WITNESS SWORN

14 The witness, GWEN ROWLING, after having been first
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KRAMER:

18 Q. Please state your name and address for the record.

19 A. Gwen Rowling. My address is 11902 Burnett Road,
20 Austin, Texas.

21 Q. And could you give your position and describe your
22 responsibilities with ICG?

23 A. I'm Vice President - State Government Affairs, and I'm
24 responsible for the state regulatory activities for
25 ICG.

1 Q. And, Ms. Rowling, did you prepare or cause to be
2 prepared the direct testimony of Gwen Rowling submitted
3 in this matter consisting of 18 pages and four
4 Exhibits?
5 A. I did.
6 Q. And did you prepare or cause to be prepared the
7 rebuttal testimony of Gwen Rowling consisting of nine
8 pages?
9 A. I did.
10 Q. Do you have any corrections or additions to the
11 testimony?
12 A. I do. In my direct testimony on Page 11, on Line 16,
13 it should read, "The annual cap for Tier 1 and Tier 2
14 is \$120 million." Then I would like to also move that
15 corrected sentence to Line 14 so that the first
16 complete sentence would read, "There are overall annual
17 caps on penalties payable by Southwestern Bell. The
18 annual cap for Tier 1 and Tier 2 is \$120 million." In
19 addition, on Line 14, I would like to strike the words
20 "In addition," and I would like to include the words
21 "Within the annual cap limits." So, if I might, let me
22 just kind of read that all over again. So, on Line 14,
23 it would begin, "Yes. There are overall annual caps on
24 penalties payable by Southwestern Bell. The annual cap
25 for Tier 1 and Tier 2 is \$120 million. Within the

1 annual cap limits, if Southwestern Bell pays \$3 million
2 to a single CLEC or \$10 million to all CLECs in any one
3 month, the ILEC has the opportunity to initiate a show
4 cause proceeding to demonstrate why it should not be
5 liable for payments exceeding the monthly benchmarks of
6 \$3 million for a single CLEC and/or \$10 million for all
7 CLECs."

8 Q. Do you have any additional corrections?

9 A. No, I do not.

10 Q. As so corrected, if I asked you each of the questions
11 contained in your direct and rebuttal testimonies,
12 would your answer today be the same?

13 A. Yes, it would.

14 MR. KRAMER:

15 Madam Chairman, at this time, I move the admission
16 of Ms. Rowling's testimony and Exhibits and tender
17 her for cross.

18 CHAIRWOMAN HELTON:

19 So ordered. Ms. Foshee?

20 CROSS EXAMINATION

21 BY MS. FOSHEE:

22 Q. Good morning, Ms. Rowling.

23 A. Good morning.

24 Q. How are you?

25 A. Just fine.

1 Q. Good. Can we agree that the issue here today is not
2 whether the parties will have performance measurements
3 but which performance measurements the parties will
4 have?

5 A. I think that we can be in agreement on the fact that
6 it's a question of whether or not we'll have a fully
7 articulated set of performance measurements that are
8 functional immediately or a set that BellSouth proposes
9 that are not fully articulated and therefore not
10 functional immediately as well as the issue has to be
11 also, tied to that, an enforcement mechanism plan
12 because, unless we tie the enforcement mechanisms,
13 self-effectuating enforcement mechanisms, then all we
14 have is data, data on a performance measurement, rather
15 than a self-effectuating enforcement mechanism that has
16 some teeth to the performance measures and that also
17 has the ability to ensure that BellSouth does
18 performance obligation under 251 and 252, and those, I
19 believe, are the issues.

20 MS. FOSHEE:

21 Madam Chair, if I could . . .

22 CHAIRWOMAN HELTON:

23 Ms. Rowling, I think you just summarized your
24 testimony. Could you please keep your answers
25 confined to what's asked?

1 A. Yes, ma'am.

2 Q. And ICG's proposal comes from Texas, does it not, not
3 from any state in BellSouth's region; correct?

4 A. That is correct.

5 Q. Thank you. Let's look at some of the measures that
6 you've proposed and some of BellSouth's measures. Do
7 you have your proposal before you?

8 A. Yes, I do.

9 Q. Okay. If we could look, first, at the Texas
10 measurement or ICG's measurement, which is average time
11 to return FOC. I think it's on Page 9 of your
12 measurements. Can you tell me what that measures?

13 A. If you look on that, you can see on the definition the
14 percent mechanized completions available within one
15 hour for EDI and LECs which are OSS systems.

16 Q. I'm sorry. Are you looking at average time to return
17 FOC?

18 A. I'm looking on Page 9.

19 Q. I'm sorry.

20 MR. KRAMER:

21 I'm sorry. Where are we? Yeah. Excuse me.

22 MS. FOSHEE:

23 It's Page 9 of my Exhibit, average time to return
24 FOC.

25

1 MR. KRAMER:
2 Oh! Exhibit. You said Exhibit. I'm sorry.
3 MS. FOSHEE:
4 Yes, sir.
5 MR. KRAMER:
6 You said the testimony.
7 MS. FOSHEE:
8 Yes, sir.
9 MR. KRAMER:
10 That's what the confusion is.
11 MS. FOSHEE:
12 I hope we have the same pages.
13 VICE CHAIRMAN HOLMES:
14 You're on Page 9 of 141?
15 MS. FOSHEE:
16 Yes, sir.
17 A. I have the percent mechanized completions available
18 within one hour for completion in SORD for Page 9.
19 Q. That's my Page 10. I'm sorry. We'll have to just kind
20 of work around this, . . .
21 A. Okay.
22 Q. . . . but the measurement I'm looking for is average
23 time to return FOC. It's probably one page over from
24 where you were.
25 A. Okay.

1 Q. Okay.

2 A. I've got it.

3 Q. Thanks. Can you tell the Commission what this

4 measurement measures?

5 A. As it said in the definition, because each of the

6 performance measures has a definition, the average time

7 to return a firm order confirmation, which is when the

8 ILEC says that they're going to install facilities, is

9 from receipt of complete and accurate service request

10 to the return of a confirmation to the CLEC.

11 Q. Okay. And I presume that ICG thinks this is an

12 important measurement.

13 A. Yes, it is, and, if you notice, it is important because

14 it's fully articulated in the Texas performance

15 measurement.

16 Q. Okay. Ms. Rowling, have you ever looked at BellSouth's

17 performance for ICG under its measurement of FOC

18 timeliness in . . .

19 A. Yes.

20 Q. . . . BellSouth's SQMs on the web site?

21 A. Yes.

22 Q. When was the first time you looked at that?

23 A. Actually, because I'm not in Operations, the first time

24 I looked at it or was able, I should say, to look at

25 it, is just this past week. The reason is that, in

1 order to access the PMAP, you have to use a user ID
2 code as well as a password, and the user ID and pass
3 code that we were provided to look at the PMAP was
4 actually inaccurate. It would only allow us to go into
5 what's called "PON" report, purchase order number
6 reports, and not allow us to access the PMAP. I didn't
7 realize that because I kept on, when I used the user ID
8 code and password that was provided to us . . .

9 MS. FOSHEE:

10 Madam Chairman, again, I asked her when was the
11 last time she looked at the measurements.

12 CHAIRWOMAN HELTON:

13 But she's explaining when she looked at it and
14 that there was a delay because of an incorrect
15 password. She has the right to say that.

16 MS. FOSHEE:

17 Okay.

18 A. I didn't realize it was incorrect because, when I used
19 it, it would call up the PON reports, and then, when I
20 clicked on the PMAP site, I kept on getting a web site
21 that says, "PMAP site is temporarily unavailable due to
22 system maintenance. Please check later." So I kept on
23 thinking that, all right, it was doing service or doing
24 some update. It wasn't until some inquiries were
25 further made to our Account Manager at BellSouth that

1 we were told that we had to get - that he had not
2 provided us with the correct user ID and password in
3 order to access the PMAP which is the actual
4 performance measurement data. So I did get that and
5 looked at it.

6 CHAIRWOMAN HELTON:

7 So, now, would you go on with it? You looked at
8 it last week?

9 A. Yes, ma'am.

10 CHAIRWOMAN HELTON:

11 Okay.

12 Q. Okay. Ms. Rowling, I'm glad you brought that up,
13 because one of your other witnesses did as well. When
14 you had this alleged problem with getting into PMAP,
15 did you ever call the BellSouth Help Desk?

16 A. No, because I didn't realize there was anything wrong
17 because, when the screen came up that the PMAP site was
18 just under maintenance, that's why I just assumed
19 because that happens in other web sites for the ILECs.

20 Q. How many times in a row did you try it when it said it
21 was under maintenance?

22 A. I can't remember the exact count but several times
23 during the course of a week.

24 Q. Okay. And you never called the Help Desk?

25 A. No, ma'am, I did not, . . .

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Q. Okay.

A. . . . thinking that it was just under maintenance.

Q. Okay. Did you call your Account Team for help?

A. I believe that's who we finally had to call to get the different pass code.

Q. Okay. So, when you called your Account Team, it got resolved?

A. Yes, it finally - well, keep in mind we called the Account Team originally to get the user ID and the pass code that we assumed would get us to the PMAP.

Q. Okay. Did you ever refer to BellSouth's web master for assistance in this matter?

A. No. I can't say that I'm an expert on negotiation on web masters and that sort of thing. So the answer to that would probably be no.

Q. Okay. So you looked at these for the first time last week?

A. Yes, I did.

Q. Do you understand that BellSouth's measure for FOC timeliness measures the average time to return FOCs?

A. Well, can you please go ahead and let's go ahead and turn over to where that BellSouth measurement is in Mr. Coon's attachment so we could take a look at that?

Q. Sure. I'm sorry. I don't have those page numbers written down. If we look at the Table of

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Contents, . . .

A. Yes. So which one would be the one that you're pointing out? No. 6, Page 15, would that be it, FOC's timeliness?

Q. Uh-huh.

A. Okay. So let me just turn there, if I might.

MR. KRAMER:

I'm sorry. Could you state where you are? We were just getting this out.

A. I was turning to Page 15 of Mr. Coon's Exhibit No. 1, . . .

MR. KRAMER:

Okay.

A. . . . which I think is the measurement that was indicated to me; is that correct?

Q. Yes, it is.

A. Okay.

Q. Thank you.

A. Okay. Yes, this is - the name of the measurement is "Firm Order Confirmation Timeliness," and, if you notice, under that measurement, a situation, if you turn to the following page, well, actually, if you turn to that page, Page 15, under "Business Rules," you'll notice that LNP, which is local number portability, says "Under development." If you turn to the next

1 page, Page 16, under "Retail Analog/Benchmark," it
2 indicates that "The benchmark is under development.
3 Retail Analog also under development." So, what the
4 two measurements are trying to get at - the Texas and
5 the BellSouth may touch on the same type of data
6 collection - what the concern is, is that this
7 particular measurement and other measurements for
8 BellSouth are under development. There's levels of
9 disaggregation. For example, the LNP, the local number
10 portability, is under development. So this particular
11 measurement would not provide me information on
12 receiving a FOC for an LNP order, and, in addition to
13 that, because the benchmark is still under development,
14 there is - so, regardless of the information I get,
15 let's say I get 20 percent of my FOCs back in five
16 hours of submittal, it still doesn't show me what's the
17 benchmark of where it should hit. Should it hit it in
18 five hours? Should it hit it in three hours or what?
19 Whereas, if we go back to the Texas performance
20 measure, it is articulated in terms of the
21 disaggregation as well as the benchmark and so that's
22 the significant difference. Just saying we have the
23 FOC return in one set, the FOC return in the other set,
24 the information isn't the same.

25 Q. Let me follow up on that real quick. Did you look at

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Mr. Coon's Exhibit DAC-2?

A. Okay.

Q. Have you reviewed that?

A. Yes, I have.

Q. Okay. So you're aware that, at least with respect to the LNP orders, those are going to be implemented on December 15 of this month; correct?

A. That's my indication insofar as his testimony in Tennessee. He indicated that on the stand, and also, since we turned to that particular Exhibit No. 2, the way the Exhibit is laid out, - a column on BellSouth, a column on ICG's Texas measurement - it would appear that it's a one-to-one correlation; you know, one measurement over here lines up with this measurement over here, and that's not correct, because, when you look through the measurements, the business rules that describe the measurement and what's being measured is not the same. So I . . .

Q. Okay. Ms. Rowling, let's just stick to the question; okay?

A. Okay. Okay. I'm sorry.

Q. What I asked you was, DAC-2, . . .

A. Yes.

Q. . . . LNP orders, Page 3, . . .

1 MR. KRAMER:

2 Madam Chairman, I'm going to object. Ms. Foshee
3 asked her question about Mr. Coon's Exhibit 2.
4 She was answering the question about Exhibit 2. I
5 don't think there's a valid objection because Ms.
6 Foshee was getting a fuller answer than she wanted
7 to hear. She asked her a question about it in the
8 course of her examination. She's entitled to
9 finish answering the question.

10 MS. FOSHEE:

11 Madam Chairman, I didn't ask for a full
12 dissertation on Exhibit 2. I asked for a specific
13 piece of it, and I'll . . .

14 CHAIRWOMAN HELTON:

15 Let me explain to the two of you, since I don't
16 think either one of you have been in this Hearing
17 Room before. We are an administrative hearing.
18 Strict rules of evidence we do not go by, and we
19 have provided witnesses much leeway, as a matter
20 of fact in previous arbitration hearings, a
21 tremendous amount of leeway in explaining these
22 complicated issues. So I would like to hear her
23 answer, and I would also like for you all to be a
24 little bit more direct in your questions and in
25 your answers.

1 A. Yes, ma'am.

2 MS. FOSHEE:

3 Yes, ma'am.

4 Q. Okay. Let's just look at Page 3, . . .

5 A. Okay.

6 Q. . . . DAC-2. We talked about LNP orders; correct?

7 A. Yes.

8 Q. If you look under the column on Mr. Coon's DAC-2, as of

9 December 15, we're going to have mechanized LNP;

10 correct?

11 A. That's correct.

12 Q. Okay.

13 A. That's what it indicates in this, that that's

14 apparently the target date.

15 Q. Okay. Thanks. And, with respect to some discussion we

16 had about the firm order confirmation timeliness, . . .

17 A. Uh-huh.

18 Q. . . . while I understand what you explained to the

19 Commission about certain things being under

20 development, you'll agree with me, from your review

21 last week of the PMAP data, that there is data

22 available to ICG on firm order confirmation timeliness;

23 correct?

24 A. Yes, there is data that's available. I . . .

25 Q. I understand it may not be the data you want, but there

1 is data available; correct?
2 CHAIRWOMAN HELTON:
3 There's data available. There's no benchmark
4 available; correct?
5 A. Yes, ma'am.
6 CHAIRWOMAN HELTON:
7 Okay. Could we move on?
8 MS. FOSHEE:
9 Yes, ma'am.
10 Q. Let's look at one other one very quickly, Ms. Rowling.
11 A. Uh-huh.
12 Q. Let's look at, on the Texas measurement, the mean
13 installation interval.
14 A. Okay.
15 Q. It's on Page 34 of my Exhibit, . . .
16 A. Okay.
17 Q. . . .so I'm guessing it's Page 35 of yours.
18 A. Okay. Let me go to that area, then.
19 Q. Measurement 27.
20 A. Mean installation interval.
21 Q. Okay. What does that one measure?
22 A. It measures, again, looking at the definition, the
23 average business days from application date to
24 completion date, meaning the installation date.
25 Q. Okay. Again, ICG would, presumably, consider this an

1 important measurement; correct?
2 A. That is correct.
3 Q. Okay. And have you ever looked up BellSouth's
4 performance data for ICG on the BellSouth measurement
5 of order completion interval?
6 A. Can we turn to that particular measurement under the
7 BellSouth?
8 Q. Sure, we can, but I was just asking if you had ever
9 looked it up on the web.
10 A. It refreshes my memory, if we could.
11 Q. Sure. Again, I've got to check the Table of Contents.
12 It's order completion interval.
13 A. Is that IV, under "Provisioning," in the Table of
14 Contents?
15 Q. Absolutely. Yeah. You're faster than I am.
16 A. Page 24.
17 Q. And I just want to know if you've ever looked up this
18 data on the web.
19 MR. KRAMER:
20 Creighton, where is it? Creighton, where is it;
21 Page 24?
22 CHAIRWOMAN HELTON:
23 Page 24.
24 MR. MERSHON:
25 Page 24.

1 A. Yes, that is one of the ones that we did look at it.
2 Q. Okay. And last week was the first week you looked at
3 it?
4 A. The first I personally looked at it.
5 Q. Okay. You don't have any information that anyone else
6 at ICG looked at it before last week; do you?
7 A. As a matter of fact, it's my understanding, in talking
8 with our Service Delivery Team, that someone else -
9 it's my understanding, first of all, that the PMAP has
10 been up since April of this year. At least, that's
11 what the notification is from BellSouth, and it's my
12 understanding that we did have an employee head-
13 quartered in Atlanta that was looking at the
14 performance measurements provided by BellSouth, and,
15 again, may I just point out, on Page 25, which is in
16 the same measurement, the level of disaggregation as
17 well as the benchmark are missing from the BellSouth's
18 performance measurement on this particular one, and,
19 again, looking at the data, if I might, looking at the
20 exact data that's on the PMAP, this shows what the
21 completion is when it doesn't show UNE combinations.
22 It doesn't show the switching. It doesn't show even
23 what the benchmark is. It doesn't provide us with the
24 exact information of what we're looking for in order to
25 ensure performance is being - standards are being met.

1 Q. Okay. Ms. Rowling, I didn't see it attached to your
2 testimony. Did you prepare a point-by-point comparison
3 of the two proposals for the Commission?
4 A. No, I did not.
5 Q. Okay.
6 A. We would be happy to do so, but we did not include that
7 in our testimony.
8 Q. Okay. Now, another thing that you stated, as I
9 understood from your testimony, was that the ICG
10 proposal is more complete because it has 121
11 measurements, I think is the number; is that correct?
12 A. I don't think that my point is that it's more complete
13 just because of the sheer number of measurements. I
14 think it's more complete in terms of the business rules
15 are fully matured so that the performance measurements
16 can be operational, can be functional. So the
17 information in the calculation, the statistical
18 calculation of the information, is there in the Texas
19 plan. It is not there in the performance measurements
20 that BellSouth presents. The measurements themselves
21 are just one small part of the whole process. The
22 measurements have to also be fully articulated and
23 functional in terms of what they're measuring, how the
24 data is calculated, the statistical methodology
25 applied. In Texas, it's the modified Z-test in order

1 to calculate whether or not the performance is meeting
2 benchmark or parity, whatever standard it is. The
3 BellSouth measurements do not have that, do not
4 incorporate that. So, when I say "fully," not as
5 complete, I'm referring in terms of functional
6 completeness as well as operational areas that
7 BellSouth does not monitor in their performance
8 measurements, like DSL provisioning and other areas.

9 Q. Okay. Just one more quick question about the
10 measurements. On Page 9 of your rebuttal, Lines 16
11 through 17, . . .

12 A. Okay. Let me just get to that.

13 Q. Sure. Let me know when you're there.

14 A. Okay. What was the page again?

15 Q. Sure. Page 9, Lines 16 through 17.

16 A. Page 9. Okay.

17 Q. You state that "It would be preferable for the
18 Commission to adopt a plan that can be immediately
19 implemented in order to protect the growth of local
20 competition." Are you aware that BellSouth has been
21 working on its SQMs for over two years?

22 A. I'm very well aware of that. In fact, I've recently
23 seen a letter that you all filed in Georgia saying, I
24 think it was a year and a half, but I'm aware you've
25 been working on them for a long time, which is part of

1 our concern and disappointment, that, even though
2 they've been out there for a long time, they're not, in
3 fact, complete and fully functional.

4 Q. Okay. And you're aware, also, I assume, that BellSouth
5 has spent over \$50 million to implement its current
6 SQMs.

7 A. I'm afraid I can't tell you how much you've spent.

8 Q. Okay. But your position is that the ICG proposal could
9 be implemented by BellSouth immediately; is that
10 correct?

11 A. In terms of having - yes, I do believe, in terms of
12 having - first of all, there is some overlap, but we do
13 need to set benchmarks, the standards, and add the
14 statistical calculation. Texas, too, worked for over a
15 year and a half on these performance measurements, and,
16 rather than to save resources in terms of putting
17 something that's operational immediately in an
18 interconnection agreement, what we're doing today, what
19 ICG is doing today, in Kentucky, is actually measured
20 in a full and complete manner, because we've made an
21 investment in this state, and we have customers in this
22 state, and we have operational issues in this state.

23 Q. Okay. Let's talk about the penalties.

24 A. Okay.

25 Q. Under your proposal, your Tier 1 penalties are going to

- 1 be paid to ICG; correct?
- 2 A. It's paid to the CLEC.
- 3 Q. Okay. And Tier 2 will be paid to the state; correct?
- 4 A. That is correct.
- 5 Q. Okay. So we can agree, and I think you admit in your
6 testimony, that the Tier 2 payments are penalties;
7 correct?
- 8 A. Actually, I think they're called, in the Texas plan,
9 assessments.
- 10 Q. And I think you call them penalties in your testimony,
11 if you'll look on Page 7 of your rebuttal.
- 12 A. Okay.
- 13 Q. So I'm assuming that we can agree on that.
- 14 A. Let me get back to the rebuttal.
- 15 Q. It's Line 15.
- 16 A. Okay. Okay.
- 17 Q. You say, ". . . while Tier 2 payments are remitted to
18 the state as penalties."
- 19 A. Yes. In the Texas plan, they referred to penalties as
20 well as assessments.
- 21 Q. Okay.
- 22 A. The two words are used.
- 23 Q. Okay. Did ICG submit any cost studies to support the
24 amounts of either your Tier 1 or your Tier 2 payments?
- 25 A. Because Texas developed this plan not just for ICG

1 specific but for the CLEC industry as a whole, no, no
2 cost studies were produced for ICG in particular.
3 Q. Okay. And does ICG have any data to substantiate the
4 appropriateness of these payments?
5 A. If we could please turn to . . .
6 Q. Absolutely. If you could just answer my question yes
7 or no and then I would be happy to have you explain.
8 A. Is there information as far as the amounts are
9 concerned?
10 Q. Does ICG have any data to support the appropriateness
11 of these payments for ICG?
12 A. Yes. I would like to turn to, if I might, my Exhibit
13 2, . . .
14 Q. Okay.
15 A. . . . which is Attachment 17. It's labeled "Attachment
16 17," and turn to Page 5, please, Section 6.1, the
17 second full sentence, "By incorporating these
18 liquidated damages terms into an interconnection
19 agreement, SWBT and CLEC agree that proof of damages
20 from any 'noncompliant' performance measure would be
21 difficult to ascertain and, therefore, liquidated
22 damages are a reasonable approximation of any
23 contractual damage resulting from a noncompliant
24 performance measure. SWBT and CLEC further agree that
25 liquidated damages payable under this provision are not

1 intended to be a penalty." This is referring to the
2 Tier 1 damages. So the whole point of the Texas plan
3 was to try to come to a reasonable approximation of the
4 damages that CLECs would individually suffer, and, in
5 fact, BellSouth incorporates this language almost
6 verbatim in their FCC proposal which they, too,
7 proposed Tier 1 and Tier 2 damages and penalties and
8 assessments.

9 Q. Okay. I'm well aware of what your Attachment 17 says,
10 but my question is, do you have any data or evidence to
11 support the payments that you propose to this
12 Commission are a reasonable approximation of damages
13 that ICG might suffer in Kentucky?

14 MR. KRAMER:
15 Objection. Asked and answered.

16 MS. FOSHEE:
17 I'm not sure she did answer.

18 CHAIRWOMAN HELTON:
19 Do you have any data?

20 A. No, ma'am.

21 CHAIRWOMAN HELTON:
22 Thank you.

23 Q. Thank you. Okay. Let's talk about the caps real
24 quickly. On Page 11 of your direct, and I think that
25 may be the testimony we worked on earlier, . . .

1 A. Okay.

2 Q. Are you there?

3 A. Yes.

4 Q. Okay. So there's a \$120 million annual cap, and then
5 we talk about a \$3 million to a single CLEC monthly
6 cap, and I think you confirm this in your testimony,
7 but I just want to make sure. The monthly \$3 million
8 amount is not a true cap; is it? My understanding is
9 it's, at that point, that the ILEC has the opportunity
10 to come in and try to make a case as to why they
11 shouldn't pay any more; correct?

12 A. Because they made so many changes to this particular
13 section, let's make sure I'm answering the question
14 directly.

15 Q. Absolutely.

16 A. There is an overall annual cap of financial liability
17 for the ILEC under this plan for any amounts paid out
18 of \$120 million, period. There is a monthly cap
19 payable to an individual CLEC of \$3 million. Now, at
20 the end of the year, if the \$120 million, in fact, has
21 not been paid out but the individual CLEC, instead of
22 the one month, only got \$3 million because of that
23 monthly cap but the damages suffered and the
24 misperformance measurement really meant that they
25 should have been paid \$3.1 million, let's say, if

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there's money left over in the \$120 million cap, then the system goes back to day one and proactively pays out to the individual CLECs and that's how that monthly cap figures into the annual cap.

Q. Okay. I think you actually hit my question right on the head. I want to make sure I have this clear. It's my reading of your proposal that the \$3 million number in a month is not a cap, as you called it, but rather it's a point at which the ILEC can file a show cause proceeding and come in and argue to this Commission as to why it shouldn't pay any more. Am I wrong about that?

A. You're correct. In Attachment 17, it does discuss that the \$3 million there is a show cause proceeding that can be initiated, but, again, if the \$120 million is paid out, there is no additional financial liability for the ILEC.

Q. Okay. But, hypothetically, if an ILEC just had a really bad month, it, arguably, could pay more than \$3 million in a month; right?

A. If, at the end of the year, they hadn't paid out the whole \$120 million, that is correct.

Q. Okay.

COMMISSIONER GILLIS:

But they can only file that once a year, not

1 monthly; is that correct? The show cause can only
2 be filed at the end of the year . . .

3 CHAIRWOMAN HELTON:
4 Reconciliation.

5 COMMISSIONER GILLIS:
6 . . . if the \$120 million has not been met?

7 A. Well, I think I might answer that more accurately by
8 saying it only would be effective at once a year, in
9 other words, that there might be a show cause
10 proceeding if they missed it continually every month,
11 but the CLEC wouldn't get any damages or penalties over
12 the \$3 million unless it was that proactive paying out
13 of the extra money that was left over from the \$120
14 million fund.

15 Q. Now, Ms. Rowling, as I understand it, there wasn't any
16 modification of this proposal from Texas to Kentucky;
17 correct?

18 A. You're absolutely correct, and that does bring - may I?

19 Q. Sure.

20 A. Okay. There was not. There was not. We did take the
21 complete Texas plan and put it into our testimony, but
22 that does bring a point that I would like to make as
23 far as a potential readjustment to the Texas plan. The
24 Texas plan has \$120 million cap which we just
25 discussed. I also included - and I don't mean to be

1 lengthy, but I do want to present this. I also
2 included a letter from the FCC, Larry Strickling, who
3 wrote a letter to SBC and said that they thought, the
4 FCC thought, the \$120 million cap was too low. It only
5 represented 2.19 percent of Southwestern Bell's local
6 revenues. The point that the FCC was trying to make is
7 that the penalties, the financial liability, has to be
8 significant enough to compel compliance. Now, I
9 recognize very clearly that BellSouth's local revenues
10 in this state is not as much as Southwestern Bell in
11 Texas. The cap maybe should be adjusted for BellSouth,
12 because I think, with a \$120 million cap for Kentucky
13 alone, it comes out to maybe 14-15 percent of what I
14 think the estimated gross revenues for BellSouth is
15 which I think is like \$800 million. I mean, I might be
16 wrong. I'm estimating that, just pulling up some
17 publicly available data. It's interesting, though,
18 that, in BellSouth's proposal to the FCC, it proposed a
19 \$120 million cap for all of BellSouth's states
20 regionwide, and, for Kentucky, it proposed a \$6 million
21 cap. That \$6 million cap, if we look at \$6 million,
22 would only be, I think it was, .75 percent, not even
23 1 percent of a proportion of BellSouth's gross of local
24 revenues. So what I'm trying to get at is that we
25 potentially do need to readjust that kind of a cap here

1 in Kentucky. A hundred and twenty million dollars for
2 BellSouth in Kentucky is too much; six million is too
3 low. So somewhere.

4 CHAIRWOMAN HELTON:

5 Let's do a further comparison.

6 A. Yes, ma'am.

7 CHAIRWOMAN HELTON:

8 There's a \$10 million cap on all CLECs in Texas
9 per month that SWBT would have to pay out if they
10 did not meet their performance measurements.

11 Let's compare that to Kentucky; not in dollar
12 terms but in number of CLECs. How many CLECs are
13 there in Texas operating; do you know?

14 A. I don't know as far as the number of certificated
15 CLECs. It's different than the number of operating
16 CLECs, . . .

17 CHAIRWOMAN HELTON:

18 Right.

19 A. . . . and I'm afraid I don't know the exact number of
20 operating CLECs.

21 CHAIRWOMAN HELTON:

22 Okay. Ms. Foshee?

23 MS. FOSHEE:

24 Thank you.

25 Q. We may have to give Creighton a raise if the revenues

1 went up to \$800 million.

2 A. We pulled it as far as ARMIS data, I think it is. It's

3 called . . .

4 Q. I'm just kidding. Okay. There's two other quick

5 things I want to go over, and then I think I'm going to

6 be done.

7 A. Okay.

8 Q. On Page 16 of your direct testimony, you talk about the

9 fact that penalties are good because they take the, I

10 think the quote, "He said/she said," out of the

11 process. It's Line 12.

12 MR. HATFIELD:

13 What page was that?

14 MS. FOSHEE:

15 Page 16.

16 A. Page 16? Okay.

17 Q. Yes, ma'am, of your direct.

18 A. Okay. Yes. Uh-huh. I'm there.

19 Q. ICG and BellSouth sometimes disagree today as to whose

20 fault certain performance issues are; correct?

21 A. I'm sure that might be correct.

22 Q. Okay. And, with millions of dollars on the line, it's

23 probably fair to say that these disputes over fault

24 would probably increase; do you agree with that?

25 A. No, not necessarily; I don't.

- 1 Q. Okay. Well, let's say we just have the number of
2 disputes we have today. Under your procedure, the
3 Commission is still going to have to resolve those
4 disputes; correct?
- 5 A. No, that's not correct in terms of our proposal because
6 we're asking for self-executing enforcement mechanisms
7 so we don't have to come and litigate each operational
8 issues on a month-to-month basis. That is, in fact -
9 and utilize the CLECs' resources, BellSouth's
10 resources, and the Commission's resources.
- 11 Q. And, to the extent the parties don't agree as to
12 whether those mechanisms should be enacted, there's
13 going to be a dispute; correct?
- 14 A. I'm sorry. You said the mechanisms should be enacted?
- 15 Q. I'm sorry. Let me rephrase it. To the extent that the
16 parties don't agree that, in a certain situation, a
17 penalty should apply, the parties are going to have a
18 dispute about that; correct?
- 19 A. If there's any disagreement, we're looking at actual
20 objective data in terms of the number of orders
21 submitted, the FOCs that were returned, the SOCs that
22 were returned. So, instead of, when I say a "He
23 said/she said," a descriptive dispute, it's actual
24 data that's put forward and so that's part of the
25 issue, and I don't know of any dispute in Texas where a

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CLEC has disputed the actual raw data after looking at the raw data.

VICE CHAIRMAN HOLMES:

Have there been any disputes in Texas once the performance measurements have been adopted between the CLEC and ILEC, and how was that resolved?

A. Yes, sir, there have been - although ICG is not one of them, there have been disputes in terms of the complaint process filed in Texas, and I know of at least two that I'm aware of, and they're working out certain operational dispute issues that have occurred in the Southwestern Bell back office systems in regards to provisioning UNE platform.

VICE CHAIRMAN HOLMES:

Does that go to the Commission for resolution or . . .

A. As a matter of fact, that's being worked out informally with staff and Southwestern Bell and the CLEC.

VICE CHAIRMAN HOLMES:

Thank you.

CHAIRWOMAN HELTON:

Ms. Foshee?

Q. Ms. Rowling, you understand that, in Georgia, in lieu of penalties, the Georgia Commission adopted an expedited dispute resolution process for these type of

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issues?

A. I'm aware that Georgia had an expedited dispute resolution process that they adopted on an interim basis. However, they have never actually gone through the required rulemaking process under Georgia's APA to actually finalize to finally adopt those, and it's my understanding that that's required by Georgia law. I'm not an attorney, but I believe that is. So I'm aware of that situation in Georgia.

Q. Okay. Well, let's put aside the legalities of it. My understanding is that ICG in Georgia has never availed itself of that process; correct?

A. No, we did not.

Q. Okay.

A. As a matter of fact, there has only been two CLECs that attempted to use that process. One CLEC, MFS, filed a complaint in '97, and, even though the procedures had not been finalized at that point in time, they had been written. The dispute resolution procedures had not been finalized but they had been written, so to speak. So they decided to use those procedures in that particular complaint. The complaint was filed in '97, and let's see. The Order affirming the Hearing Officer's decision was entered in December of '98, and BellSouth filed for a stay. That was denied, but

1 BellSouth did file for an appeal of the decision. So,
2 in that case, that particular complaint didn't work
3 very expeditiously. The other case that I'm aware of
4 the parties decided to more or less suspend it. It's
5 not resolved yet, but those are the only cases that
6 have ever been filed.

7 Q. But, Ms. Rowling, it's your position that that MFS case
8 that you're referring to was decided under the Georgia
9 Commission's expedited dispute resolution in its
10 performance measurement docket?

11 A. No, I did not say it was performance. I thought your
12 question was in regards to had anybody, ICG, used the
13 Georgia expedited rulemaking process.

14 Q. I'm sorry. If that was your understanding, it was my
15 fault. I wasn't clear in my question. I was talking
16 about the expedited dispute resolution process that the
17 Commission implemented specifically to address
18 performance issues.

19 A. That's the same Georgia expedited process that they
20 adopted in the performance measurement Order. It's the
21 same one that MFS and MGC used; yes, ma'am.

22 Q. Okay.

23 A. It is.

24 Q. Okay. Let's see. I think that may be all my
25 questions. Well, let me just ask one follow-up

1 question on that and then I think I'm done. The only
2 reason I mentioned the Georgia expedited dispute
3 resolution process is that I think one of the reasons
4 that you think penalties are appropriate is because you
5 contend that a complaint resolution process won't work,
6 and, at least with respect to one that has been set up
7 in Georgia, ICG doesn't have any first-hand experience
8 as to whether it will work or not; does it?

9 A. No.

10 Q. Okay.

11 A. Apparently, only two CLECs do.

12 MS. FOSHEE:

13 That's all of my cross. Thank you, Madam
14 Chairman.

15 CHAIRWOMAN HELTON:

16 Ms. Dougherty, we'll take a break before you begin
17 questions.

18 MS. DOUGHERTY:

19 I have no questions.

20 CHAIRWOMAN HELTON:

21 Okay. We'll still take a break.

22 OFF THE RECORD

23 CHAIRWOMAN HELTON:

24 Mr. Kramer, redirect?
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MR. KRAMER:

Yes. Thank you.

REDIRECT EXAMINATION

BY MR. KRAMER:

Q. Ms. Rowling, do you remember you and Ms. Foshee had a discussion about the caps and the caps on an individual CLEC?

A. Yes.

Q. Could it ever happen that BellSouth would be required to pay an amount anywhere near the cap based on a single instance or a single incident? How does Bell reach those caps?

A. The way that the structure of the assessments is, is that a single instance of a missed installation date, for example, is not going to even result in any kind of monetary payment by the ILEC, and here's the reason why. There are several reasons, actually, why. The Texas plan is extremely forgiving to the ILECs' misperformance. I mentioned a statistical calculation in order to ensure that the perception of missed or substandard performance is actual. So there's a 95 percent chance that is statistically built into this plan that statistically it will demonstrate that the ILEC actually did cause to have happen substandard performance. Some other plans may be 85 percent

1 certainty but Texas set it very high at 95 percent
2 statistically. In addition to that, the Texas plan, if
3 you notice, the benchmarks under the business rules,
4 which is my Attachment 1, the benchmark - sometimes you
5 have to hit 95 percent of the benchmark. So sometimes
6 they don't even have to hit the full benchmark every
7 time. In addition to that, in Attachment 17, which is
8 my second Exhibit, there is what's called a K-value
9 table in that Attachment 17 and what that is, is a
10 list. If a CLEC, because of their operations in a
11 particular state, has 70 measurements one month, the K-
12 value goes across for 70 measurements applicable to
13 that particular CLEC, the one, two, whatever, there's a
14 particular number of measurements that are missed that
15 are really thrown out. They're excluded from any
16 payments. In addition to that, Tier 2 assessments are
17 only payable if the ILEC misses them for three straight
18 consecutive months. So they can miss them in January,
19 make them in February, and miss them again the
20 following month, and there's no Tier 2 assessments on
21 the ILEC. So Point No. 1 is the plan statistically is
22 structured so it's very forgiving to the ILEC, and
23 we're to make sure that the ILEC doesn't suffer undue
24 financial harm, and the second point is, the way that
25 the measurements are structured, one missed instance of

1 a missed installation date is not going to result in
2 penalties or assessments.

3 Q. Does the \$120 million cap apply in any event and under
4 any circumstance?

5 A. The ILEC cannot exceed a \$120 million cap. It will
6 never go to \$120 million plus one dollar.

7 Q. Remember you and Ms. Foshee also discussed the Georgia
8 expedited complaint procedure?

9 A. Yes.

10 Q. Do you have a problem generally with complaint
11 procedures, expedited or not?

12 A. In terms of theoretically, no, but the concern I have
13 is, in terms of the performance measurements, it's my
14 belief that performance measurements and self-executing
15 enforcement mechanisms serve the purpose to ensure that
16 benchmarks are being met, that the CLEC is truly
17 getting nondiscriminatory access to essential
18 facilities, and, again, I refer back to the Texas plan.
19 There was a public policy issue to ensure that wide-
20 spread systemic noncompliance with 251 and 252 did not
21 occur. Hence, that's why Tier 2 assessments came about
22 in the first place. The complaint process only deals
23 with single instances of operational issues. So every
24 month that performance measurements aren't met, firm
25 order confirmations or installs aren't met, or

1 coordinated hot cuts are not met, customers are out of
2 service for more than 24 hours, etc., etc., those daily
3 operational issues that happen continually for the
4 CLEC, that we don't continually have to come back to
5 the Commission and litigate every month these issues.
6 So, in terms of procedurally, in terms of drain on the
7 resources, we're a smaller company than BellSouth. We
8 don't have the resources to come to this Commission
9 every month on these issues and that's why self-
10 executing enforcement mechanisms is important.

11 Q. You and Ms. Foshee had a discussion about looking at
12 the data contained on the PMAP?

13 A. Yes, sir.

14 Q. How useful is the data contained on the PMAP at this
15 point?

16 A. It's not useful, sir. It's not useful because of the
17 benchmark . . .

18 CHAIRWOMAN HELTON:

19 Just a second.

20 A. Yes, ma'am.

21 CHAIRWOMAN HELTON:

22 Would you restate that question?

23 MR. KRAMER:

24 I'm sorry?
25

1 CHAIRWOMAN HELTON:

2 Restate the question. I didn't quite hear.

3 MR. KRAMER:

4 Yes. Oh, sure. I'm sorry. I didn't hear you. I
5 asked how useful the data on the PMAP is. That's
6 the BellSouth web site.

7 CHAIRWOMAN HELTON:

8 Yes, I know what it is.

9 MR. KRAMER:

10 Okay.

11 CHAIRWOMAN HELTON:

12 I just didn't hear the "how useful."

13 A. I didn't find it very useful. You have listed, on a
14 state-by-state basis, for example, a number of orders
15 the percent missed. Again, just to take an example -
16 in columns, and, again, without any kind of benchmark,
17 I don't know where we are in relation to how BellSouth
18 is provisioning service to its own retail customers or
19 how BellSouth is doing in terms of other CLECs,
20 aggregate CLECs. To me, there's no threshold. So, if
21 I'm getting this percent of my orders rejected, 20
22 percent of my orders rejected, I have no idea if that's
23 comparable to what happens to BellSouth's own orders or
24 if it's way out of line. So I don't have a relational
25 picture and that's the point.

1 Q. Do you remember you mentioned the Larry Strickling
2 letter, Chief of the Common Carrier Bureau letter,
3 regarding the insufficiency of the amount of the caps
4 that BellSouth was potentially exposed to?

5 A. Yes, sir.

6 Q. Is that letter included in your testimony?

7 A. Yes, sir, it is. I believe it's Attachment 3.

8 Q. Okay.

9 A. Okay.

10 MR. KRAMER:

11 I'll just check my note cards. That's all I have,
12 Madam Chairman.

13 CHAIRWOMAN HELTON:

14 I think you said BellSouth. I believe the letter
15 refers to Southwestern Bell.

16 MR. KRAMER:

17 Oh, thank you. You're correct.

18 CHAIRWOMAN HELTON:

19 Recross?

20 MS. FOSHEE:

21 Chairman Helton, one matter. If the Commission
22 would find it appropriate or helpful - Ms. Rowling
23 referred to the data that's available on PMAP and
24 Mr. Coon can discuss it as well. BellSouth would
25 certainly be willing to file, as a late-filed

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Exhibit, an example of the data that can be pulled off PMAP in aggregate CLEC form so we don't reveal any ICG proprietary information, if that's something in which you would be interested.

CHAIRWOMAN HELTON:

Ms. Dougherty, I believe we have access to PMAP; do we not?

MS. DOUGHERTY:

Yes, we do.

CHAIRWOMAN HELTON:

Therefore, we do not need it in the record.

MS. FOSHEE:

Great. Okay. Thank you.

CHAIRWOMAN HELTON:

You had no other questions?

MS. FOSHEE:

No, ma'am. Thank you.

CHAIRWOMAN HELTON:

Thank you, Ms. Rowling.

A. Thank you.

MR. KRAMER:

Madam Chairman, shall we proceed?

CHAIRWOMAN HELTON:

Yes.

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MR. KRAMER:

We'll call Michael Starkey.

WITNESS SWORN

The witness, MICHAEL STARKEY, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Please state your name and address for the record.

A. My name is Michael Starkey, and my address is 6401 Tracton Court in Austin, Texas. The zip code is 78739.

Q. Could you describe your position and your responsibilities in that position?

A. I am the President of QSI Consulting, Inc. QSI Consulting is a consulting firm that focuses primarily on telecommunications and policy and econometric and technical aspects of telecommunications.

Q. Mr. Starkey, did you cause to be filed in this proceeding direct testimony consisting of 42 pages and four Exhibits?

A. That's correct.

Q. Was this testimony prepared by you or under your supervision?

A. Yes, it was.

Q. And, Mr. Starkey, did you also cause to be filed in this proceeding the rebuttal testimony of Michael

1 Starkey consisting of some 58 pages and one Exhibit?

2 A. Yes, I did.

3 Q. And, Mr. Starkey, was the rebuttal testimony prepared
4 by you or under your supervision?

5 A. Yes, it was.

6 Q. Do you have any corrections to either your direct
7 testimony or your rebuttal testimony?

8 A. Yes, I just have two corrections, one to my direct and
9 then one to my rebuttal. You'll notice, on the first
10 page of my direct, the address at Lines 2 and 3 don't
11 match the address I just provided. I have moved. So I
12 would remove the Chicago address that is there and
13 replace it with the Austin, Texas address I just
14 provided. Also, with respect to my rebuttal, at Page
15 45, Lines 26 and 27, there's a parenthetical in that
16 sentence that I would remove and that would be all of
17 my corrections.

18 Q. And if I asked you each of the questions contained in
19 your direct testimony and your rebuttal testimony at
20 this time, would your answers be the same?

21 A. Yes, they would.

22 MR. KRAMER:

23 Madam Chairman, at this point, I move the
24 admission of Mr. Starkey's testimony, as
25 corrected, with the Exhibits, and the witness is

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tendered for cross.

CHAIRWOMAN HELTON:

So ordered. Mr. Kitchings?

MR. KITCHINGS:

Thank you, Chairman Helton.

CROSS EXAMINATION

BY MR. KITCHINGS:

Q. Hello, again, Mr. Starkey.

A. Good morning, Mr. Kitchings.

Q. Is it correct that you graduated from Southwest Missouri State with a bachelor's degree in economics?

A. That's correct.

Q. What year was that?

A. That was 1991.

Q. Do you hold any postgraduate degrees?

A. I do not.

Q. In the eight years since you graduated, by my calculation, you've worked for the Maryland, Missouri, and Illinois Commissions and then with two consulting firms; is that correct?

A. Yes, sir, that's correct.

Q. When did you shift from Commission work to consulting work?

A. I believe we started CSG in January 1 of 1996, . . .

Q. Thank you.

- 1 A. . . . and I left the Maryland Commission to begin that
2 post.
- 3 Q. Okay. Thank you. Mr. Starkey, I believe in your
4 testimony you've stated that there is no functional
5 difference between local voice calls and ISP-bound
6 calls; is that correct?
- 7 A. Yes. I think I describe the extent to which they both
8 use the same network, the same facilities, and are
9 provided the same functions within the network; yes.
- 10 Q. Okay. Can we agree that the FCC, in its Declaratory
11 Ruling, determined that ISP-bound calls do not
12 terminate at the ISP but instead continue on to the
13 "ultimate destination or destinations," which means the
14 Internet web sites?
- 15 A. The FCC did make a determination regarding the
16 termination of traffic. The only additional
17 information I provide with that is that the FCC has a
18 very specific definition of the word "terminate" that
19 they define in Part 69 of their rules. So I don't
20 think they were making a determination with respect to
21 the functional nature of the traffic as much as they
22 were the regulatory nature of the traffic or the
23 jurisdictional nature of the traffic.
- 24 Q. Okay. Is there anywhere in the FCC Order where they
25 distinguish between the technical or jurisdictional

1 termination of the traffic?
2 A. I don't know if it's in the Declaratory Ruling itself,
3 but, as I suggested, Part 69 of their rules very
4 specifically defines the term "terminate," and I think,
5 if you read the Declaratory Ruling, you'll understand
6 that they're using the word "terminate" in the
7 Declaratory Ruling to be very specific about the
8 jurisdictional nature of the traffic. I don't think
9 they're talking and I don't think they do talk about
10 the functional nature of the traffic and any
11 consequence of it terminating at the ISP might have on
12 that functional capability.
13 Q. Is it fair to say, though, that the FCC agreed that
14 they would look at the traffic from end-to-end; that
15 is, from the end user who's making the call to the end
16 of the call which they view as being at the Internet
17 web site which is being viewed?
18 A. I think that is a fair characterization, and, again, I
19 think it highlights the fact that that's sort of part
20 and parcel of them defining the jurisdiction of the
21 call. Again, I don't think the Declaratory Ruling is
22 really speaking to the functional nature of the call as
23 much as it is to the regulatory distinction.
24 Q. Do you have a copy of your testimony there with you?
25 A. Yes, sir.

- 1 Q. Could I direct you to your, I believe it is, MS-2 of
2 your Exhibit 2 to your direct testimony? It's labeled
3 "Diagram 1," but it is, in fact, Exhibit No. 2.
- 4 A. Okay.
- 5 Q. Okay. Now, in that diagram, you show "Terminating
6 Customer," as is residential here, above "ICG Central
7 Office" box; is that correct?
- 8 A. Yes.
- 9 Q. Now, you were here earlier; were you not?
- 10 A. Yes.
- 11 Q. Did you hear ICG's witness, Mr. Holdridge, state that
12 ICG has no residential customers in Kentucky?
- 13 A. Yes, I did hear him say that.
- 14 Q. Okay. Now, looking at the bottom half of that diagram,
15 the "ICG Central Office," then there's a line that is
16 drawn to "ISP Customer," given that the FCC has found
17 that the traffic terminates, given the meaning of that
18 word in Part 69, as you pointed out, wouldn't it be
19 more appropriate to draw an additional line to the
20 Internet beneath "ISP Customer" to reflect where that
21 traffic goes?
- 22 A. It would depend completely on what it was you were
23 trying to show and what I was trying to show here was
24 the facilities of either BellSouth or ICG that were
25 used in carrying that call, and these are all of the

1 facilities of those two carriers and the facilities
2 that are at issue, is my understanding, in this
3 proceeding. These are the entirety of those
4 facilities. So I didn't include that line because it
5 simply wasn't relevant.

6 Q. Well, there aren't any facilities that ICG uses to go
7 to residential customers; are there? Because they
8 don't have any residential customers.

9 A. I used the term "residential." You could replace that
10 term with "business" or "small business" or really any
11 other type of customer, and the analysis would remain
12 the same. So I really was just trying to, with this
13 diagram - and I think in my testimony I describe it as
14 a simplistic diagram - . . .

15 Q. Okay.

16 A. . . . I was really simply trying to show the facilities
17 of ICG's and BellSouth's that were at issue.

18 Q. Okay. Now, Mr. Starkey, are you aware that BellSouth
19 keeps track of all the numbers it has for its ISP
20 customers?

21 A. Yes. My understanding is that that is their intention.

22 Q. And are you aware that ICG knows who its ISP customers
23 are within the State of Kentucky?

24 A. I hesitate in that respect. My guess would be that, if
25 endeavored to do so, they could probably identify

1 those, and I would hesitate with my same answer with
2 respect to BellSouth. It's a manual process of
3 identifying those particular numbers. So the ability
4 to do that, you know, with 100 percent accuracy is
5 probably in question, but I would agree with you that
6 they probably could try to do that.

7 Q. Okay. Are you aware, sir, that they provided us a
8 number, which I will not give because it's proprietary,
9 but they provided us a specific number through Data
10 Requests of the number of ISPs that they serve here in
11 Kentucky?

12 A. Yes, my understanding is that they provided those
13 numbers through discovery.

14 Q. All right. Thank you. Mr. Starkey, you've testified
15 on behalf of ICG in this proceeding now in six states;
16 is that correct, this being the sixth?

17 A. I believe that's correct; yes.

18 Q. Okay. And one of those states was North Carolina; was
19 it not?

20 A. Yes, it was.

21 Q. Okay. And, in North Carolina, you filed some
22 additional testimony that was styled "Supplemental
23 Testimony"; did you not?

24 A. Yes, I believe it was styled that way.

25 Q. Now, just to put this in context for the Commission,

1 this would have been filed in late July or early August
2 as that proceeding went forward in early August;
3 correct?
4 A. My memory is fading, but, subject to check, I think
5 that's probably right.
6 Q. Okay.
7 MR. KITCHINGS:
8 May I approach the witness, Chairman Helton?
9 CHAIRWOMAN HELTON:
10 Yes.
11 MR. KITCHINGS:
12 Thank you.
13 Q. Mr. Starkey, I would ask you to take a quick look at
14 what I've handed you and would purport to be your
15 supplemental testimony that we were discussing a moment
16 ago that was filed in North Carolina in late July or
17 early August. Could you take a look at that and please
18 affirm my identification?
19 A. Yes, that appears to be what it is.
20 Q. Okay. Now, that testimony was filed in response to a
21 North Carolina Utilities Commission directive that both
22 sides apply some "creative thinking" to the dispute
23 over ISP traffic; correct?
24 A. Yes, it was and you quoted the term they used. It was
25 the North Carolina Commission. We had filed our direct

1 testimony and I believe our rebuttal testimony as well,
2 and the North Carolina Commission came back to both
3 parties and asked that they apply some creative
4 thinking to this particular issue to come up with
5 perhaps some additional proposals that would provide
6 some additional options for them on the record, and
7 this was my testimony in that respect.

8 Q. And BellSouth, of course, had the same directive, and
9 Mr. Varner, at that time, presented BellSouth's plan at
10 that point in time; correct?

11 A. Yes.

12 Q. Okay. Now, isn't it also true that BellSouth has
13 offered other solutions, such as track and true-up and
14 bill-and-keep?

15 A. Yes. Mr. Hendrix includes three options in his
16 testimony.

17 Q. Okay. Now, you didn't make - well, let me back up for
18 just a second. For shorthand purposes, would it be
19 accurate for me to call this the adjusted call length
20 proposal?

21 A. Yes, I think you could call it that.

22 Q. All right. You did not make the adjusted call length
23 proposal in this proceeding; did you?

24 A. No, sir, we didn't. If you'll look at Page 2 of my
25 testimony there, and it looks like I may have made this

1 mark on an earlier copy of yours in a different state,
2 at Lines 9 through 11, I explain that ICG's proposal in
3 this particular piece of testimony is not something
4 that we think is the best way to do things. We think
5 it's economically sound, in some sense, but certainly
6 we didn't think and continue not to think that this is
7 the proper way to do it.

8 Q. Okay, but, as a matter of policy, shouldn't the
9 Commission consider as many different proposals in
10 resolving this difficult issue?

11 A. Certainly the Commission could and should look at
12 proposals, but they should ultimately arrive at - my
13 hope is that they'll ultimately arrive at the one that
14 is the most economically efficient and sound, and we
15 think the one that we've presented in this case meets
16 that criteria more so than this one.

17 Q. Mr. Starkey, I would direct your attention, as we've
18 done before, to Page 4, Lines 13 through 17, and ask
19 you to read those sentences, please, or actually it's
20 just one long sentence.

21 A. Okay. It says, "Also, because the traditional models
22 assume an 'average length of call' in their calculation
23 (and that average length of call has generally been
24 assumed to be approximately 3 to 4 minutes in length
25 compared to the approximately 20 minutes in length for

1 an average ISP bound call), ISP calls recover more 'Set
2 Up' cost than they actually generate."

3 Q. Okay. Would you now turn to Page 6 and look at the
4 table at the top of that page? I have a question or
5 two for you there. Is it accurate to say that that
6 table outlines the calculation of an adjusted call
7 length for an Internet call as compared to a voice
8 call?

9 A. Yes. What this table does is it takes all local calls
10 and individually separates out ISP calls and the
11 characteristics of that particular subset and then
12 attempts to do the same calculation using those
13 different characteristics of those two types of calls.

14 Q. Okay. So the voice call has a standard length of 3.3
15 minutes, and the ISP call has a standard call length of
16 20 minutes; is that correct?

17 A. Pursuant to this particular calculation, that's
18 correct. One thing that I would sort of highlight in
19 that is, although at the top of that table I noted it
20 as voice calls, it's really all local calls minus
21 Internet calls. There could very well be also local
22 data applications and other types of calls in that
23 group. I was a little bit probably sloppy in calling
24 it simply voice calls.

25 Q. But the voice calls category does not include Internet

1 calls; correct?

2 A. Well, see, actually that's another point. It does
3 because where I pulled these numbers was directly from
4 BellSouth's cost studies, and my understanding was that
5 what BellSouth had done within its cost studies was it
6 had taken all local calls or calls it, at that time,
7 considered to be local, which included Internet calls,
8 and taken an average. I simply used those numbers and
9 then said, "Okay. We have some additional information
10 with respect to what an ISP call might look like by
11 itself." So I didn't really pull those out. I simply
12 took different characteristics from a different source
13 of what ISP calls might look like, and, because of
14 that, I think you can assume that, included in this
15 aggregate of what I've titled here as "Voice Calls,"
16 Internet service calls are also included in that.

17 Q. Okay. Well, let's cut to the chase on this, Mr.
18 Starkey. You would agree that your document has a
19 different call length between the voice calls and the
20 ISP, that is, 3.3 minutes versus 20 minutes; correct?

21 A. Yes, I would and, if you'll look at the source for the
22 20 minutes, that's an input. I assumed that. I didn't
23 have any real factual data with which to put that in.

24 Q. Okay. Given the table that you have constructed, the
25 costs, in fact, differ; do they not? If you look at

1 your table, costs per minute for voice call is \$.0043,
2 and the cost of a standard Internet call is \$.0048.; is
3 that correct?
4 A. Yes, those are the numbers that are included in the
5 table.
6 Q. Okay. Thank you. Mr. Starkey, are you aware of
7 whether or not ICG conducted any cost studies in this
8 docket?
9 A. They did not produce a cost study for ISP-bound
10 traffic.
11 Q. Without cost studies, can this Commission know whether
12 or not the reciprocal compensation rate that you
13 propose in this case covers ICG's costs?
14 A. Yes, I think they can. I think, at the very minimum,
15 they can make a learned opinion based upon that, and I
16 think one thing they can rely on in that respect is the
17 FCC's most recent Order, the UNE remand Order, that was
18 released on November 5, at Paragraph 260. The FCC has
19 basically said at Paragraph 260, and I'll just read it
20 - that probably makes more sense. At Paragraph 260, it
21 says, "When we examine the market as a whole, we find
22 that requesting carriers incur higher costs due to
23 their inability to realize economies of scale using
24 circuit switching equipment. We find that the scal-
25 ability of a switch mitigates but does not eliminate

1 the incumbent LEC's scale advantages and reduces but
2 does not eliminate competitor's sunk costs and entry
3 barriers." It then goes on to say, "For example,
4 competitor's switching costs per minute at a 10%
5 penetration level are slightly more than twice the cost
6 of an incumbent LEC serving the remaining 90% of
7 the market with its own switch. We find that, as a
8 general proposition, requesting carriers will incur a
9 materially greater cost when self-provisioning
10 switching at low penetration levels." I think what the
11 FCC is really saying there is that, if you rely on Rule
12 51.711 in its rules which says that the CLEC can use
13 the ILEC's costs in order to set a reciprocal
14 compensation rate, then certainly you know that they're
15 not overrecovering based on that rate, and I think,
16 pursuant to what they've said in the UNE Remand Order,
17 you can assume that they're probably not recovering
18 their costs associated with that. They've given the
19 CLECs, in, I believe, Rule 51.387, the opportunity to
20 file a cost study if they want to charge more than the
21 ILEC's rates. ICG hasn't done that, but certainly I
22 think the proposition that ICG would be overrecovering
23 at BellSouth's rates everything indicates that that
24 wouldn't be the case.

25 Q. Mr. Starkey, you're here on behalf of ICG presenting

1 economic testimony; is that accurate?

2 A. Yes, to some extent. I would suggest also policy
3 related testimony.

4 Q. Okay. But, in the context of economic testimony and
5 holding yourself forth with the economic background
6 that you have, can you assure this Commission that ICG
7 would not be receiving a windfall if it is awarded the
8 reciprocal compensation that it requests without
9 specific cost studies in the record?

10 A. I guess you and I could quibble about the word
11 "windfall" and what that means, but, to cut through
12 that, I think all indications are that ICG would not be
13 overrecovering and would likely be underrecovering
14 based on BellSouth's reciprocal compensation rate.

15 Q. I'm sorry. Can you help me understand; is that a yes
16 or a no?

17 A. That is - well, I don't know that it's either. It's an
18 answer more specific to your question, I think.

19 Q. Are you saying that that question is incapable of being
20 answered with a yes or a no?

21 A. Maybe, if I could hear it again, I'll try again.

22 Q. Okay. Okay. I simply want to know that, in your
23 context as putting forth economic testimony, can you
24 assure this Commission that, without cost studies in
25 the record, that ICG - can you assure this Commission

1 that ICG is not receiving a windfall through the
2 payment of the reciprocal compensation rate that you
3 espouse?

4 MR. KRAMER:

5 Madam Chairman, I'm going to object. The witness
6 did do his best to give a serious answer to the
7 question. It was not an evasive answer, and I
8 don't think it's fair to give him a question with
9 words like "windfall" and expect him to answer yes
10 or no when he has tried his best to give a serious
11 answer to the question.

12 CHAIRWOMAN HELTON:

13 Mr. Starkey, I do believe he asked you, and you
14 said you could quibble about the word "windfall."
15 I would like to know. Can you give any assurance
16 that there's not going to be a big end balance?

17 A. I can give an assurance that there won't be a big end
18 balance. I think I would preface that, though, by
19 saying that all cost studies are estimates. I mean,
20 there's no way to get around that. Nobody could sit on
21 the stand and say, "Here's my cost study. I give you
22 100 percent assurance that what is in here is a
23 complete, total, accurate representation." It's the
24 best we can do. My answer to Mr. Kitchings was an
25 attempt on my part to say, yes, I think the FCC has

1 given us good reasons why ICG's costs are more than
2 BellSouth's; hence, that, if ICG relies on BellSouth's
3 costs, there is a tremendous possibility, and it's
4 likely to be the case, that ICG will not only not
5 overrecover but that it won't recover its actual costs.

6 MR. KITCHINGS:

7 Thank you, Chairman Helton.

8 Q. Mr. Starkey, would you agree with me that the
9 reciprocal compensation rate is an average rate for
10 local traffic?

11 A. Yes, it is.

12 Q. Okay. Now, do we know, Mr. Starkey, if the fees that
13 ICG charges to its ISP customers are sufficient to
14 cover its costs, again, without cost studies in the
15 record?

16 A. Not entirely. Not entirely. The only reason I would
17 preface the answer to that question is we would have to
18 be more specific as to what costs they were meant to
19 recover, maybe a marginal cost or an incremental cost.
20 I think we can be fairly well assured that they're
21 recovering their marginal cost, because it makes no
22 sense for ICG to provision services below its marginal
23 cost absent any market power. Whether they would
24 recover some type of costs in order to make them a
25 profitable company, obviously, I think Ms. Schonhaut

1 will testify that they're not profitable at this point
2 in time because of enormous sunk costs that are
3 necessary to compete in telecommunications, but I
4 think, as a general matter, we could agree and be
5 fairly assured that they are recovering their marginal
6 costs.

7 Q. Are you aware of any evidence in the record that ICG
8 has put in, either through your testimony or any of the
9 other witnesses, which would support the notion that
10 ICG's charges to its ISP customers cover its costs?

11 A. I don't know that there's any data in the record in
12 that respect. I was simply providing you that they
13 simply have no incentive not to. They would be working
14 against their own best interest to provide lower rates
15 than what their marginal costs would bear.

16 Q. As a matter of policy, should ICG recover more than its
17 costs through the payment of reciprocal compensation?

18 A. No, it shouldn't. Reciprocal compensation rates, in
19 order for symmetrical reciprocal compensation rates to
20 work effectively, they should be based on the costs of
21 the carriers.

22 MR. KITCHINGS:

23 Chairman Helton, I only have one more line of
24 questions for this witness, and I did not do so
25 earlier. I would request that the testimony that

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Mr. Starkey filed in North Carolina, which I presented as an Exhibit, be admitted into the record.

CHAIRWOMAN HELTON:

So ordered.

MR. KITCHINGS:

Thank you.

STARKEY CROSS EXHIBIT 1

Q. Mr. Starkey, on Pages 7 and 8 of your rebuttal testimony, you refer to states which have ordered that reciprocal compensation for ISP-bound traffic and have ruled in the way that you request in this hearing; is that accurate?

A. That's fair.

MR. KRAMER:

I'm sorry. Could you just give me a moment to get that?

MR. KITCHINGS:

Sure.

MR. KRAMER:

Thank you.

MR. KITCHINGS:

Uh-huh.

Q. Can you tell the Commission how many of those decisions you refer to were arbitrations for new interconnection

1 agreements?

2 A. Yes. There have currently been eight states that have
3 reached the merits of reciprocal compensation in an
4 arbitration since the Declaratory Ruling which was
5 February of this year.

6 Q. Okay. So that's eight of the fifteen or sixteen that
7 you refer to on those two pages?

8 A. Well, obviously, we're shooting at a moving target here
9 because arbitrations are ongoing . . .

10 Q. Sure.

11 A. I'm relying, I guess, on more recent information.
12 Actually, I think there have been, at this point, 25
13 states that have issued a decision since the
14 Declaratory Ruling. Eight of those were in
15 arbitrations.

16 Q. Okay. So that leaves 17, by my calculation, but I
17 wasn't very good at math. That's why I went to law
18 school. Those 17, those would have been in the context
19 of interpreting contracts and what the parties
20 intended; is that correct?

21 A. I think largely we could agree to that. Though, if you
22 read through the decision, some of them make more
23 broadly based policy arguments than that and suggest
24 that, on a going-forward basis, that will also be their
25 finding. It's simply that it wasn't brought to the

1 Commission in an arbitration. That's why I sort of
2 separate those, but I think other of those states - and
3 I'm thinking of West Virginia, particularly - the case
4 was brought to the Commission via a complaint, but the
5 Commission decided a very broad policy question of ISP-
6 bound traffic is and should be subject to reciprocal
7 compensation, and it does so on a going-forward basis.

8 Q. Can we agree, sir, though, generally there is a
9 difference between looking at a contract that two
10 parties had entered into and the intent of those
11 parties versus setting policy on a going-forward basis?

12 A. Yeah, I think we could agree that the intent is the
13 issue in the first round, and the policy is more the
14 issue in the second.

15 Q. Okay. Okay. That's fair. Did the number that you
16 referenced, which is now 25, does that number include
17 the result of the BellSouth/DeltaCom arbitration in
18 South Carolina?

19 A. Yes, it does.

20 Q. And did you participate in that proceeding on behalf of
21 DeltaCom, Mr. Starkey?

22 A. Yes, I did. As I was looking through this list, I've
23 actually participated in five of the eight that have
24 been decided in arbitration since February, and South
25 Carolina was one of those.

1 Q. Okay. And was your position, in essence, the same that
2 you take here; that is, that reciprocal compensation is
3 due for ISP traffic?
4 A. Yes, that was the position in South Carolina.
5 Q. Okay. Do you know what the result of the South
6 Carolina DeltaCom/BellSouth arbitration was?
7 A. South Carolina is the only of those eight states to
8 determine in an arbitration that they disagreed with
9 our position.
10 Q. Okay. So, to round that out, South Carolina did not
11 agree with the position that you advocate; is that
12 correct?
13 A. That's right. They were the only state not to in the
14 arbitration.
15 Q. Okay. Now, we've spoken about the difference between
16 these two sorts of cases, but, in a complaint case
17 setting, are you familiar with a decision out of
18 Louisiana which dealt with a complaint case between a
19 company called KMC and BellSouth?
20 A. Yes, I am aware of that.
21 Q. Okay. Now, we've talked about this one before. I
22 would like to read to you a portion of the findings
23 there and ask you, as a matter of good public policy,
24 would you agree with allowing a CLEC to do what is
25 found here.

1 A. Okay.

2 Q. "KMC generated approximately \$636,427 in revenue from
3 providing service to its ten Louisiana ISP customers
4 during the same time period that it billed BellSouth
5 \$2,160,985 in reciprocal compensation traffic for those
6 ten ISP customers." Mr. Starkey, do you believe it
7 represents good, sound public policy and economic
8 reasoning to allow a CLEC to obtain more in revenue
9 from BellSouth than from its end-user customers?

10 A. And, as I've answered this question in the past, I
11 don't think you can derive good, sound economic or
12 public policy from that simple comparison. What I've
13 suggested is that - what this Louisiana case really is,
14 is KMC had a number of ISP providers. BellSouth had a
15 number of customers that were calling those ISP
16 providers. BellSouth, the reciprocal compensation was
17 paying, I guess, about \$2.16 million to KMC to carry
18 its customers' traffic to those ISPs. Even though KMC
19 may have only been getting \$636,000 roughly from its
20 ISPs, what you have to remember is those ISPs were
21 actually receiving calls, and I think I did the math
22 based on some of Mr. Varner's calculations in Georgia,
23 from somewhere between 25,000 and 30,000 BellSouth
24 local customers. So, if you asked the question, is it
25 reasonable for KMC to recover \$2.16 million for

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providing service to some 35,000 or 40,000 BellSouth customers, I think the answer to that question is it very well could be, and, if the rate of the reciprocal compensation was based on BellSouth's costs, then, yes, it would be.

Q. Okay. That's fair. I would also read to you one other quote . . .

A. Okay.

Q. . . . near the end of that Order from Pages 20 and 21, the Commission stated, "Indeed, in this particular case, KMC billed BST reciprocal compensation for ISP traffic that was approximately 340 percent more than KMC received in revenue from providing actual service to its ten ISP customers in Louisiana. The negative impact on competition in the local market as well as the potential for abusing the reciprocal compensation obligation from permitting such arrangements are obvious." Is it fair to say, Mr. Starkey, that you would disagree with the Louisiana Public Service Commission on that point?

A. There's a number of things I would disagree with the Louisiana Public Service Commission about on that point. The first one being they used the word that KMC provided actual service to the ISPs, indicating that they didn't provide actual service to the 35,000 or

1 40,000 BellSouth customers that were calling those
2 ISPs. Those BellSouth customers wouldn't have been
3 able to get to their ISP without KMC. I would suggest
4 that KMC was providing actual service to those
5 customers as well, and I think the same answer that I
6 gave earlier is responsive to this as well, which is,
7 whenever you see the fact that KMC was providing that
8 kind of service to that many customers, the \$2.16
9 million isn't that out of line necessarily. I mean,
10 again, you would have to look at their underlying
11 costs, but, assuming that the rate of reciprocal
12 compensation is based on BellSouth's costs, I don't
13 think that that is necessarily economically inefficient
14 or shows bad public policy. The Louisiana Commission
15 does agree, but I disagree with their finding; yes.

16 Q. So you would disagree with their finding, in essence?

17 A. Yes, I would.

18 Q. Okay. Now, finally, Mr. Starkey, you discuss the
19 concept of cost causation in your testimony; don't you?

20 A. In response to Dr. Taylor, I do.

21 Q. Okay. Is it fair to say that your position is that the
22 cost of making ISP-bound calls should be pushed back as
23 closely as possible to the cost causer?

24 A. Yes, I think those are the words I use in my testimony,
25 and, by that, I mean that economic decision-making

1 requires that, whenever you generate costs, and let's
2 use the network, whenever I generate cost as a caller
3 on the network, the rates I pay should reflect the cost
4 I cause to me so that I can make rational economic
5 decision-making. In my testimony when I say that the
6 costs should be pushed back as close to the cost causer
7 as possible, I mean for that intention so that they can
8 recognize the costs it is that they cause.

9 Q. Okay. I'll ask you a hypothetical, Mr. Starkey.

10 A. Okay.

11 Q. If it were demonstrated in Kentucky that BellSouth was
12 not covering its costs in providing local service to
13 its customers and reciprocal compensation is awarded to
14 ICG in this case, would you be in favor of raising
15 local rates to those customers as cost causers?

16 A. I would have to know several bits more of information
17 before I could answer yes or no to that. The first
18 thing we would need to talk about is - BellSouth's
19 local rates, it's my understanding, if they're done
20 like pretty much everywhere else in the country, are
21 based on averages across particular customer groups,
22 residential or business. If BellSouth were, one,
23 losing money on all residential customers or all
24 business customers or all local customers because of
25 reciprocal compensation and BellSouth came in, through

1 a rate case or however it wished to pursue such a thing
2 with the Commission, and it was found that they were
3 not entering a return on their rate base, then, you
4 know, I think it's traditional public policy and
5 regulatory policy that they should be allowed to
6 recover those revenues. However, to take a particular
7 type of service, and let's say calls bound for the
8 Internet, and say that those particular services don't
9 allow BellSouth to recover revenues on that given
10 service, that's the single issue ratemaking issue that
11 both the RBOCs and the Commissions have really sort of
12 avoided in the past, you know, like it was the plague,
13 because what they really do is look at the entire
14 BellSouth business entity as a whole in determining
15 what rates are appropriate in terms of public policy.

16 Q. Well, averages are fairly common throughout the use of
17 telecommunications pricing and costing; aren't they?
18 There's nothing unusual about that; is there?

19 A. Well, they are, though. Competition is certainly
20 putting pressure on those averages.

21 MR. KITCHINGS:

22 Okay. I don't have anything further. Thank you,
23 Mr. Starkey. Thank you, Chairman Helton.

24 CHAIRWOMAN HELTON:

25 Ms. Dougherty?

1 MS. DOUGHERTY:

2 No questions. Thank you.

3 CHAIRWOMAN HELTON:

4 Redirect?

5 MR. KRAMER:

6 Thank you, Madam Chairman.

7 REDIRECT EXAMINATION

8 BY MR. KRAMER:

9 Q. Mr. Starkey, Mr. Kitchings asked you several questions
10 about your Exhibit 2, a diagram contained in Exhibit 2,
11 your simplified model. Could there also be a tandem
12 switch involved in the interconnection between the two
13 parties?

14 A. Yes.

15 MR. KITCHINGS:

16 I object, Chairman Helton. I asked nothing about
17 a tandem switch. It doesn't seem to me that
18 that's appropriate redirect.

19 CHAIRWOMAN HELTON:

20 But you did ask about the diagram, and he's asking
21 about the diagram. So, Mr. Kramer, proceed.

22 Q. There could also be a tandem switch involved; isn't
23 that correct?

24 A. Yes, and it's likely that there would be one.

25

1 MR. KRAMER:
2 Okay. That's the only question I had on that,
3 Madam Chairman. I just was . . .
4 CHAIRWOMAN HELTON:
5 Any recross?
6 MR. KRAMER:
7 I'm sorry, on that issue.
8 CHAIRWOMAN HELTON:
9 Oh, I'm sorry.
10 MR. KRAMER:
11 I have other questions. I just meant on that one
12 point so it wasn't going to get contentious. I
13 was just trying . . .
14 Q. Now, Mr. Starkey, Mr. Kitchings also asked you about
15 the North Carolina supplemental testimony; do you
16 remember that?
17 A. Yes, I do.
18 MR. KRAMER:
19 Madam Chairman, may I approach the witness for a
20 moment?
21 CHAIRWOMAN HELTON:
22 Yes.
23 MR. KRAMER:
24 Unfortunately, I only have one copy of this.
25 It's marked up.

1 Q. I am handing the witness a copy of the decision of the
2 North Carolina Utilities Commission in the arbitration
3 proceeding in which the testimony that Mr. Kitchings
4 referred to was an Exhibit, and I'm going to ask, Mr.
5 Starkey, if you will, will you please read from the
6 bottom of Page 6 and the top of Page 7?

7 A. Yes. "The Commission commends ICG and BellSouth for
8 their efforts in presenting interim proposals for ISP
9 compensation in response to the Commission's June 16,
10 1999, Order Concerning Interim Proposals for
11 Compensation in which the Commission asked the parties
12 for 'creative thinking' concerning interim prospective
13 compensation mechanisms for ISP traffic, which would be
14 subject to true-up. Of the proposals received from the
15 parties, the Commission believes that ICG's proposal,
16 which is based on UNE rates, has the greater merit."
17 Is that far enough?

18 Q. Was the proposal that the Commission was referring to
19 the supplemental creative thinking?

20 A. No, it wasn't. I think that's what they were referring
21 to when they said thanks for the proposals, but what
22 they eventually adopted was our proposal, the same
23 proposal that we are proposing here, which is to use
24 BellSouth's reciprocal compensation rate for tandem
25 interconnection.

1 Q. Now, Mr. Kitchings also asked you about the assumption
2 that you made regarding different call lengths; do you
3 remember that?

4 A. Yes.

5 Q. And he also pointed out that, based on that assumption,
6 the cost of an Internet call was lower; do you recall
7 that?

8 A. Yes.

9 Q. Okay. The cost per minute -excuse me - of an Internet
10 call was lower?

11 A. Yeah, that's an important distinction.

12 Q. Now, Mr. Starkey, would a 20 minute call to the
13 Internet and a 20 minute conventional circuit-switched
14 voice traffic call, local call, between two end users
15 have any difference in cost characteristics assuming
16 equal transport was involved in both sets of calls and
17 both calls traversed the same switches?

18 A. Yes, they would have exactly the same costs and that's
19 an important distinction to make, is the fact that,
20 whenever I said earlier that the 20 minutes for an
21 Internet call was an input, I'm afraid what can be
22 misleading about this is the fact that there isn't a
23 distinction between the cost of a voice call and a call
24 to the Internet. There may be some distinction in the
25 fact that ISP-bound calls might be longer in nature but

1 that's really a distinction between long calls versus
2 short calls. There are long voice calls, longer than
3 the average Internet call, that would cost exactly the
4 same as an equally timed Internet call. Again, they
5 use the same facilities, the same functions, of the
6 network. I think it's just important to point out that
7 what we're really talking about in this North Carolina
8 testimony is a distinction between very short calls and
9 long calls; not a distinction between voice traffic or
10 local traffic and then ISP traffic.

11 Q. Mr. Starkey, you and Mr. Kitchings also had a
12 discussion about whether, on your Diagram 2, there
13 shouldn't have been an extension on the terminating
14 side of the call to show that the call was going on to
15 the Internet; do you recall that?

16 A. Yes.

17 Q. Is what's at issue here what happens to a call once
18 it's on the Internet or the costs that are incurred
19 while it's on the networks of the two parties that are
20 involved?

21 A. The costs that are at issue here are the costs of the
22 networks of BellSouth and ICG; not the costs of the
23 call or the characteristics of the call after it
24 reaches the ISP server.

25 Q. Okay.

1 A. That's why I included just those facilities.
2 Q. Now, you were also asked some questions about cost
3 studies. Do you know if ICG did a cost study to
4 support the reciprocal compensation rate it is seeking
5 for circuit-switched voice traffic calls?
6 A. No, it did not.
7 Q. Do you know if BellSouth is contesting the rate that
8 ICG is seeking for circuit-switched voice calls?
9 A. It's my understanding that they are not and that's an
10 important point, is the fact that we've already kind of
11 established in the testimony in here today that the
12 costs of a call, whether that be toward the Internet or
13 for a local voice call, are the same. To suggest that
14 a cost study must be done for one and not the other
15 somewhat misses the point that the cost wouldn't be any
16 different.
17 Q. And so, if I asked you the same question that Mr.
18 Kitchings asked you, and I'm paraphrasing, can you
19 assure this Commission that ICG won't get a windfall
20 for circuit-switched voice traffic in the absence of a
21 cost study, would your answer be the same?
22 A. Yes, it would be.
23 MR. KRAMER:
24 I have nothing further.
25

1 CHAIRWOMAN HELTON:
2 Recross?
3 MR. KITCHINGS:
4 Thank you, Chairman Helton.
5 RECROSS EXAMINATION
6 BY MR. KITCHINGS:
7 Q. Mr. Starkey, your counsel asked you about the North
8 Carolina Order; do you recall that?
9 A. Yes.
10 Q. Can we agree that the North Carolina Order, in ordering
11 reciprocal comp, made that subject to a true-up to such
12 time as the FCC has ruled?
13 A. I need to look at it to be as specific to that.
14 MR. KITCHINGS:
15 May I approach the witness, Chairman Helton?
16 CHAIRWOMAN HELTON:
17 Yes.
18 MR. KITCHINGS:
19 Thank you.
20 A. I do remember there's a true-up provision.
21 Q. Mr. Starkey, we can go into further detail, if
22 necessary, but I would direct your attention to
23 ordering Paragraph 1 of Page 17, which I've handed you,
24 which I purport to be the North Carolina Utilities
25 Commission Order.

1 A. Okay. If you don't mind, I'll just read that and that
2 way we'll all know what it says.

3 Q. Please.

4 A. "That the parties shall, as an interim inter-carrier
5 compensation mechanism, pay reciprocal compensation for
6 dial-up calls to ISPs at the rate the parties have
7 agreed upon for reciprocal compensation for local
8 traffic and as finally determined by this Order,
9 subject to true-up at such time as the Commission has
10 ruled pursuant to future FCC consideration of this
11 matter." That was what I was trying to remember, is
12 that it's really subject to the North Carolina
13 Commission ruling on the FCC whenever it makes a
14 determination.

15 Q. But, again, it is subject to a true-up?

16 A. Yes, sir, there is a true-up mechanism.

17 MR. KITCHINGS:

18 Thank you. Thank you, Chairman Helton. I don't
19 have anything further.

20 CHAIRWOMAN HELTON:

21 You may be excused.

22 A. Thank you.

23 MR. MERSHON:

24 Madam Chairman, I think we don't have a lot of
25 questions for this next witness, if you wanted to

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do it before lunch, but it's up to you.

CHAIRWOMAN HELTON:

Let's get started, then. Next witness?

MR. KRAMER:

Madam Chairman, we would be happy to provide a clean copy of the North Carolina decision for the record and to the staff and Commissioners. We'll get that to you early next week or maybe even today.

CHAIRWOMAN HELTON:

Thank you. We'll order it into the record.

MR. KRAMER:

Thank you.

CHAIRWOMAN HELTON:

Thank you.

MR. KRAMER:

At this time, ICG calls Cindy Schonhaut.

WITNESS SWORN

1 The witness, CINDY SCHONHAUT, after having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. KRAMER:

5 Q. Would you state your name and address for the record?

6 A. My name is Cindy Schonhaut, and my address is 161
7 Inverness Drive West, Englewood, Colorado.

8 Q. And could you give your position and describe your
9 responsibilities, please?

10 A. I'm Executive Vice President of Government and
11 Corporate Affairs at ICG Communications which is the
12 parent holding company of ICG Telecom, which is a
13 certified CLEC that operates in Kentucky. I report
14 directly to the CEO and Chairman of the Board, and I
15 have responsibility for all public policy matters at
16 all levels of government; that is, federal, state, and
17 local, including legislative and regulatory, as well as
18 I have responsibility for external affairs which is
19 interconnection agreements with the ILECs and related
20 issues as well as industry associations.

21 Q. Ms. Schonhaut, did you cause to be submitted in this
22 proceeding the direct testimony of Cindy Schonhaut
23 consisting of 12 pages?

24 A. Yes.

25 Q. And did you also cause to be submitted in this

1 proceeding the rebuttal testimony of Cindy Schonhaut
2 consisting of 17 pages?
3 A. Yes.
4 Q. And was each of these testimonies prepared by you or
5 under your supervision?
6 A. Yes.
7 Q. Do you have any corrections to your testimony?
8 A. Yes, I have a couple of corrections. In my direct
9 testimony on Page 3, the first question which the
10 answer is on Lines 3, 4, and 5, the list of states
11 where I've testified before includes the State of
12 Colorado. Actually, it's mentioned twice, and I would
13 like to delete both references and add the State of
14 Illinois. In my rebuttal testimony on Page 14, the
15 last line on the page, Line 23, where it says "the
16 Commission," I would like to change the word "the" to
17 "this." Those are my only corrections.
18 Q. As corrected, Ms. Schonhaut, if I asked you each of the
19 questions contained in your direct and rebuttal
20 testimonies, would your answers to those questions be
21 the same?
22 A. Yes.
23 Q. Thank you.
24 MR. KRAMER:
25 Madam Chairman, at this time, I would like to move

1 Ms. Schonhaut's testimony into the record. I
2 would also request permission of the Chair to ask
3 Ms. Schonhaut a couple of direct questions that
4 are necessary to correct the record in this
5 proceeding.

6 CHAIRWOMAN HELTON:

7 Okay.

8 Q. Ms. Schonhaut, were you here for the testimony of Mr.
9 Holdridge?

10 A. Yes.

11 Q. Are you qualified to correct the testimony of Mr.
12 Holdridge?

13 A. Yes.

14 Q. And what is the basis of your ability to correct the
15 testimony of Mr. Holdridge?

16 A. I'm a senior executive officer of the company, and I
17 often have more accurate and current information than
18 the people that work for me in the company. So I would
19 like to correct, for the record, certain factual pieces
20 of information that I think should stand as corrected
21 so they would be accurate.

22 Q. All right. Would you please give the areas of
23 correction?

24 A. Yes, I would. First, ICG does serve residential
25 customers in Kentucky, and this is a correction not

1 only to Mr. Holdridge's testimony, but I checked . . .
2 CHAIRWOMAN HELTON:
3 Ms. Schonhaut, just a minute.
4 A. Okay.
5 CHAIRWOMAN HELTON:
6 Mr. Kramer, could you ask specific questions so
7 that we don't get into a long discussion?
8 A. Okay.
9 MR. KRAMER:
10 I will do that.
11 A. Excuse me.
12 MR. KRAMER:
13 Yes.
14 Q. Ms. Schonhaut, does ICG serve residential customers in
15 Kentucky?
16 A. Yes, we do. The correction is - I wanted to add that
17 it's not only to Mr. Holdridge's testimony but
18 BellSouth's Interrogatory No. 9 to ICG was essentially
19 the same question. So I want to correct that as well.
20 Q. Okay. And, Ms. Schonhaut, is it accurate that the
21 Alabama settlement was part of a settlement regarding
22 other issues? I'm sorry. May I withdraw that and
23 rephrase? Was the performance standards issued in the
24 Alabama proceeding withdrawn as a part of a settlement
25 of other issues?

1 A. No, it wasn't withdrawn as a settlement. ICG withdrew
2 its testimony regarding the issue of performance
3 measures in Alabama by just our own voluntary choice.
4 It wasn't part of a settlement.
5 Q. All right. Ms. Schonhaut, is it the company's position
6 that BellSouth has a current obligation to combine new
7 unbundled network elements?
8 A. No. We believe that BellSouth, at this time, has no
9 such current obligation.
10 Q. Are we asking the Kentucky Commission to require
11 BellSouth to combine currently uncombined elements?
12 A. Yes, we are.
13 Q. And is that a step that goes beyond where the FCC went?
14 A. Yes, it's a step beyond what the FCC did, but the FCC
15 expressly allowed for such a step.
16 Q. We'll have an opportunity.
17 MR. KRAMER:
18 Thank you, Madam Chairman. Nothing further.
19 CHAIRWOMAN HELTON:
20 She's tendered for cross?
21 MR. KRAMER:
22 Yes, I'm sorry. She's tendered for cross, and, at
23 this time - I'm not sure you ruled on the
24 admission of her testimony.
25

1 CHAIRWOMAN HELTON:

2 Her testimony is so ordered into the record.

3 MR. KRAMER:

4 Thank you.

5 CHAIRWOMAN HELTON:

6 Mr. Kitchings?

7 MR. KITCHINGS:

8 Thank you, Chairman Helton.

9 CROSS EXAMINATION

10 BY MR. KITCHINGS:

11 Q. Good morning, Ms. Schonhaut.

12 A. Good morning.

13 Q. A couple of follow-up questions to your counsel's
14 direct questions. Did I understand you to say that, in
15 fact, ICG does serve residential customers in the State
16 of Kentucky?

17 A. Yes, we do.

18 Q. Can you say whether that is through facilities-based
19 competition, resale, or the purchase of UNES?

20 A. It's through resale.

21 Q. Through resale. Exclusively?

22 A. Yes. All of the residential customers we serve we
23 reach by reselling BellSouth's services; yes.

24 Q. Okay. Can you state how many residential customers ICG
25 serves in the State of Kentucky?

1 A. I don't actually know that number. What I can tell you
2 is most of them are employees of ICG; not all but the
3 majority of them are.

4 Q. Can you provide us, through a late-filed Data Request,
5 a correction to the Data Request which we asked earlier
6 which states that no customers are residential in
7 Kentucky?

8 A. Yes, we will.

9 Q. Okay. Thank you. Are they confined, Ms. Schonhaut, to
10 one area of Kentucky or is it spread throughout the
11 state?

12 A. I believe it's mostly in the same area where we provide
13 facilities-based service to business customers, that
14 is, the Greater Louisville Area.

15 Q. But, again, it is through resale as opposed to
16 facilities-based?

17 A. Yes. Yes.

18 Q. Okay. Now, a couple of questions, then, about your
19 business plan here in Kentucky, Ms. Schonhaut. Do you
20 have a copy of your testimony handy?

21 A. Yes, I do.

22 Q. I've got a couple of citations for you that I would
23 like you to turn to and then read those sentences in
24 sequence.

25 A. Is this direct? Excuse me. Is this direct or . . .

1 Q. There will be a couple of direct, and then one out of
2 your rebuttal. So you'll need copies of both.

3 A. Okay. I have both. I just wanted to go to the
4 appropriate one.

5 Q. Okay. The first citation I would cite you to is on
6 Page 6, Lines 11 through 13. I would ask you to read
7 that to the Commission, please.

8 A. Page 6. I've got it. "In addition, with reciprocal
9 compensation for calls to ISPs precluded as a source of
10 revenue, ICG would find it necessary to weigh whether
11 it would be a wise business decision to expand its
12 investment and provide increased services in Kentucky."
13 That's it?

14 Q. Okay. That's it; yes, ma'am. Please turn to Page 10.

15 A. Yes.

16 Q. Beginning at the very end of Line 12 with the word
17 "Without . . .," if you would read that sentence,
18 please.

19 A. "Without compensation for ICG's costs in serving a
20 significant category of its customers, ICG could be
21 forced to re-think its options concerning its
22 operations in this state."

23 Q. Okay. And, finally, Ms. Schonhaut, I would direct you
24 to your rebuttal testimony, Page 4, Lines 14 through
25 16.

1 A. Yes. Do you want me to read that sentence?
2 Q. Please.
3 A. "If reciprocal compensation for calls to ISPs were
4 foreclosed as a source of revenue for several months or
5 more, ICG would be forced to re-think its options
6 concerning its further investment in this state."
7 Q. Okay. Now, with those three sentences that you've just
8 read as background, is ICG saying that, if it does not
9 receive a reciprocal compensation award in this docket,
10 that it is going to cease competing in the State of
11 Kentucky?
12 A. Absolutely not.
13 Q. Okay. Hypothetically, Ms. Schonhaut, if the FCC
14 concludes, in its Notice of Proposed Rulemaking, not to
15 award reciprocal compensation for calls to ISPs, will
16 ICG's business decision to provide service in Kentucky
17 also - same question. Will you remove your business
18 from Kentucky?
19 A. Absolutely not, and I think the three sentences that we
20 read together clearly say that we would take, under
21 advisement, into consideration the fact that there's no
22 reciprocal compensation in this state. We would not
23 remove the current facilities that we provide service
24 to - that we have in place or the customers we provide
25 service to. We would be rethinking, and the word is

1 "our further investment," future options for expansion,
2 facilities, UNEs, or resale, whatever. That's a normal
3 evaluation through a business planning process.

4 Q. Okay. Now, in your rebuttal testimony on Page 10, you
5 refer to the Alabama and North Carolina Commission
6 decisions, and were you here earlier when counsel was
7 talking with Mr. Starkey about the North Carolina
8 decision?

9 A. Yes, I was.

10 Q. Can we agree that, in both the North Carolina Order and
11 the Alabama Order, the Commissions there determined
12 that the payment of reciprocal compensation would be
13 subject to true-up?

14 A. Actually, I don't agree with the way you said that, if
15 I may explain . . .

16 Q. Please.

17 A. What both Commissions said is that the rate is subject
18 to true-up, that is, that reciprocal compensation will
19 apply to ISP traffic, and that is not going to be
20 revisited or somehow trued up through the term of the
21 interconnection agreement. What the Alabama Commission
22 said, which is an effective Order, and the North
23 Carolina is in pending effectiveness, the Alabama
24 Commission said specifically they're establishing a
25 rate for reciprocal compensation. If the FCC after

1 that changes the rate, the new rate that the FCC would
2 impose would be what is trued up to. So it's not the
3 issue of whether ISP traffic is subject to reciprocal
4 compensation.

5 Q. Well, hypothetically, Ms. Schonhaut, if the FCC were to
6 determine that this type of traffic was best served
7 through bill-and-keep or, alternatively, that it was to
8 be through a zero rate, would not those Orders require
9 that any monies paid between the parties be returned,
10 because the rate would, in effect, be zero?

11 A. I actually believe that the answer to that is no for
12 Alabama, and I'll explain why. I was present at the
13 Commission's open meeting in Alabama where this
14 particular provision was discussed at length, and what
15 the Commission's assumption was, was that the FCC is
16 going to perhaps change the rate structure of
17 reciprocal compensation, for example, from a per minute
18 of use rate to a flat capacity-based charge, in which
19 case, the Alabama Commission said, "Well, we should
20 have that new rate structure implemented as if it was
21 on the first date of the interconnection agreement."
22 So, in a sense, yes, there could be a change. If you
23 were to tell me - your hypothetical included a few
24 things. For example, you said "bill-and-keep." If the
25 FCC were to say, down the road, that bill-and-keep is

1 the appropriate mechanism for recovery of reciprocal
2 compensation costs, I think that that would be unclear
3 whether that would be sort of trued up back to the
4 first date of the agreement, and, because it would be
5 unclear, I think that would be litigated.

6 Q. You're an attorney by training; are you not?

7 A. Yes, I am.

8 Q. And you would agree with me that the final Order of a
9 Commission is, to use layman's terms, the final word
10 out of the Commission; correct? I mean, it would
11 supersede any discussions that were held in an open
12 meeting at the Commission for legal purposes?

13 A. Oh, that's true, but the specific language of the
14 Alabama decision itself, the written effective Order,
15 specifically mentions retroactively trued up to the
16 level of intercarrier compensation ultimately adopted
17 by the FCC.

18 Q. Okay.

19 MR. KITCHINGS:

20 Chairman Helton, we would request that the Alabama
21 Order be allowed as a late-filed Exhibit. The
22 Order speaks for itself, but we would like for the
23 Commission to have the opportunity of that just as
24 we've done with the North Carolina Order.
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CHAIRWOMAN HELTON:

So ordered.

Q. Ms. Schonhaut, however, do you have a copy of that Alabama Order?

A. Oh, yes, I do.

Q. Could I ask you just to read one paragraph? Then we'll be through. I would turn your attention to Page 19 of the Order.

A. Yes.

Q. Under the subheading "Findings and Conclusions," of the Commission as to Issue No. 1, . . .

A. Yes.

Q. . . . there is a paragraph that begins on Page 19 and carries over to Page 20 . . .

A. Yes.

Q. . . . and starts off "In order . . ." Would you just read that paragraph, please?

A. That paragraph follows the sentence I just read. "In order to prepare for the eventuality of a 'true-up' of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the FCC issues

1 its anticipated federal rule governing inter-carrier
2 compensation for ISP-bound traffic and said rule
3 becomes effective, that rule will prospectively govern
4 the compensation to be paid by the parties to this
5 proceeding for ISP-bound traffic. Similarly, the
6 compensation ordered to be paid in this proceeding for
7 ISP-bound traffic will be retroactively 'trued-up' to
8 the FCC mechanism from the effective date of the
9 interconnection agreement that results from this
10 Arbitration. If through that retroactive 'true-up'
11 process any funds are found to be owing by one party to
12 the other, the party owing such funds shall submit them
13 to the opposite party within thirty (30) days of the
14 completion of the 'true-up' process."

15 MR. KITCHINGS:

16 Thank you, Ms. Schonhaut. Thank you, Chairman
17 Helton. I don't have anything further of this
18 witness.

19 MS. DOUGHERTY:

20 No questions, Your Honor.

21 CHAIRWOMAN HELTON:

22 Thank you. Redirect?

23 MR. KRAMER:

24 Thank you.
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REDIRECT EXAMINATION

BY MR. KRAMER:

Q. Ms. Schonhaut, we've had a discussion on the residential customers that ICG serves in Kentucky. Is there a reason that that offering is primarily employees?

A. Yes. The reason is that, because we provide those residential services through resale, it is a losing service, that is, with respect to financials. We lose money providing that service. ICG generally, like most telecom companies, provides some telecom services at a subsidized rate to the employees as a human resources benefit. That's common in the industry. So, where we lose money on providing the service to employees, we don't mind. However, if the customer, the residential customer, is not an employee, then we need to approach it as a business, and, through resale, there is no opportunity for us to recoup our costs and make a reasonable profit.

Q. Ms. Schonhaut, you also had a discussion with Mr. Kitchings about the true-up provisions. Do you recall that?

A. In Alabama and at North Carolina; yes.

Q. In Alabama and North Carolina?

A. I'm asking you, if you know, whether, as a matter of

1 general common law, it is automatic that there is a
2 refund when there is a change of rates? There is a
3 refund - I might withdraw and try it again.

4 A. Could you also speak a little louder, please?

5 Q. I'm sorry. Do you know, generally, whether there is
6 automatically a true-up when there has been something
7 like an accounting order pursuant to which an agency
8 has asked parties to keep track of the transactions
9 between them, or is there often discretion exercised to
10 determine whether there is, in fact, a true-up in
11 refund?

12 A. Yes, that's actually true. I mean, there is generally,
13 in the common law and there has been for a long time, a
14 principle, a rule of law, against what's called
15 retroactive ratemaking; that is, you can't go
16 backwards. However, when a Commission institutes a
17 true-up, that obviously is in advance, sort of
18 announcing that there may be retroactive ratemaking, so
19 to speak, and that's why you have an accounting
20 requirement, "Keep track of this money in case we later
21 need to know how much is owing which way or the other,"
22 but, when Commissions do that, at that point in time,
23 when the true-up would be implemented, they consider
24 various factors, including equities, the relative
25 amount of money at issue, etc.

1 Q. Okay. Finally, Ms. Schonhaut, just one other little
2 area. You and Mr. Kitchings had a discussion about
3 several quotes, and Mr. Kitchings asked you if those
4 were a threat or - well, that ICG was going to withdraw
5 from doing business in Kentucky; do you recall that?
6 A. Yes.
7 Q. And you referred to the fact that ICG would do an
8 assessment in the event that happened at either the FCC
9 level or the Kentucky level. What kind of assessment
10 did you have in mind? What would be the thinking of
11 there?
12 A. Right. Well, we would do a business planning
13 evaluation, and sometimes I've called it numbers
14 crunching because, you know, that's what's behind a
15 business plan, the opportunity to compete, how much it
16 would cost you to do so, and what you could potentially
17 provide in terms of services, and, in addition to
18 considering any change, for example, that the FCC might
19 impose that would be reflected here in Kentucky, we
20 will also have to look at the fact that we have not
21 been paid yet in any BellSouth state by BellSouth for
22 monies already owed for recip comp that those State
23 Commissions have ordered to be paid. So we are
24 operating, not in a financial sense but in my lawyerly
25 terms, at a deficit there. So we are absolutely bound

1 by our shareholders to consider the opportunity of
2 whether or not we will be able to make any money, and
3 those will be all considerations that will go into a
4 mix including the fact that we've already made
5 significant investment here, almost \$27 million and
6 growing, which would weigh on staying and continuing to
7 invest. When I said "staying," I don't mean to imply
8 that we might go. It's just an issue of how much more
9 we would expand here, how many more millions of dollars
10 we would or wouldn't invest.

11 MR. KRAMER:

12 I have nothing further, Madam Chairman. Thank
13 you, Ms. Schonhaut.

14 CHAIRWOMAN HELTON:

15 Anything else?

16 MR. KITCHINGS:

17 Just a couple of follow-ups, Chairman Helton.

18 RE CROSS EXAMINATION

19 BY MR. KITCHINGS:

20 Q. Ms. Schonhaut, you stated in response to your counsel
21 that you lose money when you resell services to your
22 employees here in Kentucky; is that correct?

23 A. Residential service.

24 Q. Residential service.

25 A. Yes, I did say that.

1 Q. All right. Now, you purchase the services at a 15 or
2 16 percent discount off of BellSouth's rate; isn't that
3 correct?

4 A. Approximately, yes.

5 Q. Do you further discount those services to your
6 employees beyond that 15 or 16 percent?

7 A. I know that we do that generally as a benefit to our
8 employees. I can't tell you the exact differential
9 here in Kentucky, but generally it's a small
10 differential.

11 Q. Didn't you also say, though, that they're not just
12 employees that you serve; there are a few other
13 residential customers that you serve?

14 A. Yes, and I should clarify who those other customers
15 are. When we serve a business and, in particular, a
16 telecommunications intensive business, - a factory
17 might be an example, just to pick one example - often
18 what happens is we work through the officers of that
19 company to help provide service to them, and we find
20 that a lot of those executives in those companies don't
21 want Bell service at home any more. They're looking
22 for an alternative. So they would say to us, "We like
23 the service you're providing at our factory. I want
24 you to provide service at home. I don't want Bell any
25 more." We will provide the service to the President of

1 that company even though we lose money doing it,
2 because it's obviously, in the bigger picture, a very
3 good business decision to do so. So that's the type of
4 customer that falls into the category of nonemployees.
5 Q. Okay. But, to that President of that company, do you
6 discount his telephone service further than the 15 or
7 16 percent discount that you receive in reselling
8 BellSouth service?
9 A. We would charge that customer approximately what Bell
10 would charge, usually a small discount off of what Bell
11 would charge for the same service. I'm not sure if I
12 understood your question. I tried to answer it. I'm
13 sorry if that wasn't the question.
14 Q. Well, let's try it again, then. You offer service to a
15 President of a company that is not an employee;
16 correct, through resale?
17 A. For example, yes.
18 Q. For example, but through resale; correct?
19 A. Yes.
20 Q. And, in reselling BellSouth services, you get a 15 or
21 16 percent discount when you purchase those services
22 from BellSouth?
23 A. Right. Right. We buy it at a wholesale rate; yes.
24 Q. Correct. Do you discount that service further to the
25 President?

1 A. Oh, you mean from the wholesale rate?
2 Q. Yes.
3 A. I'm sorry. Okay. I didn't understand. No, we don't.
4 If we - no, we don't. I'll leave that as the answer.
5 Q. Okay. But your testimony here today is that you still
6 lose money irrespective of that fact in providing
7 service to that President?
8 A. We lose money . . .
9 Q. In providing residential service to that customer.
10 A. . . . in providing residential service. Yes, we do, on
11 the average to all the residential customers together.
12 Q. Well, I'm not asking on the average, . . .
13 A. Okay.
14 Q. . . . but I'm talking about that particular customer or
15 that . . .
16 A. Uh-huh.
17 Q. . . . group category of customers that are not
18 employees. Do you lose money to those customers that
19 you provide residential service to?
20 A. We do on the local service to residential customers.
21 Yes, we do.
22 Q. Irrespective of the fact that you purchase it at a
23 discount from BellSouth?
24 A. Yes. I mean, factoring that in, yes, we do, and the
25 reason is because, even though the discount seems - you

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know, 15 or 16 percent seems like you might be able to squeeze some profit or margin out of that, for just the local residential service, which is very low price in an absolute sense and in a relative sense as well, there's no opportunity to make money. There just isn't.

VICE CHAIRMAN HOLMES:

Ms. Schonhaut, . . .

A. Uh-huh.

VICE CHAIRMAN HOLMES:

. . . you said that, when you, you know, provide that service to the President, . . .

A. Uh-huh.

VICE CHAIRMAN HOLMES:

. . . do you offer it at the same rate that they were getting it from Bell; did you say?

A. That's what I was trying to answer. I got mixed up with the question, the wholesale and retail rate. We offer it at approximately the same retail rate that Bell would offer it.

VICE CHAIRMAN HOLMES:

Okay. You get it at a discount, but you offer it at the same retail rate?

A. That's right.

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VICE CHAIRMAN HOLMES:

You still lose money off of that . . .

A. Yes, and the reason is, even though we buy it as a wholesale, we have our own additional costs, and there are many of them, and so you would have to factor those in.

MR. KITCHINGS:

Thank you. I don't have anything further, Chairman Helton.

CHAIRWOMAN HELTON:

Thank you. You may be excused.

A. Thank you.

CHAIRWOMAN HELTON:

We'll take our lunch break and reconvene at 1:15.

OFF THE RECORD

RECESS FOR LUNCH

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CHAIRWOMAN HELTON:

Mr. Kitchings, that's all the witnesses I had for ICG, so I think we're ready for your first witness.

MR. KITCHINGS:

Okay. Thank you, Chairman Helton. BellSouth would call Dr. Bill Taylor.

WITNESS SWORN

The witness, WILLIAM E. TAYLOR, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KITCHINGS:

Q. Would you please state your name and business address?

A. My name is William E. Taylor. My business address is National Economic Research Associates, Inc., One Main Street, Cambridge, Mass. 02142.

Q. By whom are you employed and in what capacity, Dr. Taylor?

A. National Economic Research Associates or NERA. I'm Senior Vice President and head of the Communications Practice.

Q. Are you the same William E. Taylor who caused to be prefiled 26 pages of direct testimony and one Exhibit?

A. Yes.

Q. And also 33 pages of rebuttal testimony?

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A. That's correct.

Q. Do you have any additions, deletions, or corrections to your testimony?

A. One typo. In the direct testimony, Footnote 19, replace the "Id.," that is it starts "Id.," with the phrase "MA ISP Compensation Order." So change "Id." to Massachusetts ISP Compensation Order.

Q. And, just so the record is clear, Dr. Taylor, is that on Page 17 of your testimony?

A. Yes.

Q. Thank you. Dr. Taylor, if I were to ask you the same questions as contained in your direct and rebuttal testimony, would your answers be the same?

A. Yes, they would.

MR. KITCHINGS:

Chairman Helton, at this point, we would move Dr. Taylor's direct and rebuttal testimony, along with his Exhibit, into the record.

CHAIRWOMAN HELTON:

So ordered.

MR. KITCHINGS:

Thank you. I have nothing further of this witness at this time, and he's available for questions.

CHAIRWOMAN HELTON:

Mr. Kramer?

1 MR. KRAMER:

2 Thank you.

3 CROSS EXAMINATION

4 BY MR. KRAMER:

5 Q. Good afternoon, Dr. Taylor. Dr. Taylor, can we agree
6 that, with respect to either a call directed to an ISP
7 or a call directed to an interexchange carrier from a
8 BellSouth subscriber, that, when the subscriber
9 initiates the call, the subscriber is the cost causer
10 for the call in either of those situations?

11 A. Yes. The subscriber, the customer, whatever you want
12 to call him, is the person who caused the cost and, in
13 my testimony, I point out it is acting as a customer of
14 the ISP or the IXC; not as a customer of BellSouth.

15 Q. And would you agree with me that, assuming it were
16 possible to do so, it would be desirable to push the
17 costs of those calls as close back to the cost causer
18 as possible?

19 A. Yes. I agree that it would be more efficient if the
20 end user, the customer, faced a price for whatever he
21 did, sending a message to the Internet or calling long
22 distance or calling local, for that matter, faced a
23 price which reflected the full cost that that act
24 entailed.

25 Q. Now, as I understand your testimony, Dr. Taylor, it is

1 that, in general, calling patterns have changed such
2 that the average length of a call is now greater than
3 at the time the current rates were put in effect and
4 that there is a greater volume of calling, and, as a
5 result, there is a shortfall in cost recovery on some
6 calls?

7 A. Yes, and there is a third reason, I believe, namely,
8 the ISP-bound calls, one thing we know about them is
9 that they are not local calls as far as jurisdiction is
10 concerned. The FCC has taught us that. So, whatever
11 they are and for the other two reasons that you gave,
12 they haven't been included in measures of average
13 calling volumes or lengths of durations so they're not
14 part of the costs that were used to set local rates.

15 Q. So your testimony is that it is those calls that are
16 driving up the overall average so that the overall
17 average of a call is out of sync with what it was when
18 the current rates were originally put into effect?

19 A. Well, I believe that's a true statement, but I'm more
20 concerned not about what happens to the average but
21 rather that a particular set of calls, namely, these
22 interstate ISP calls, are not - there is no charge for
23 them that recovers the costs that they impose on both
24 BellSouth's network and ICG's network.

25 Q. So neither ICG nor BellSouth is recovering their full

- 1 costs of providing the service for those calls; is that
2 your testimony?
- 3 A. Well, I can't speak for ICG, because ICG is recovering
4 costs. They're charging money to the ISP, and, whether
5 the money that they receive from the ISP covers their
6 cost for serving all of the in-bound calls or not, I
7 couldn't tell you, but I can tell you that, in the
8 mechanism of setting rates that BellSouth has been
9 through, that call volumes and, in particular, ISP-
10 bound interstate calls were not part of the
11 calculation.
- 12 Q. But isn't it true that ISPs, in general, take service
13 out of the local business exchange tariffs?
- 14 A. No. They do that when they take service from
15 BellSouth; that is, I think BellSouth, by FCC rule, is
16 forbidden to do anything else. I don't believe - I'm
17 not a lawyer, but I don't believe that applies to
18 CLECs. I believe you and other CLECs provide service
19 to them out of whatever tariff or whatever pricing
20 arrangement works in the market.
- 21 Q. But, as a competitive matter - let's lay to one side
22 the question of whether they take out of the local
23 business exchange tariff when they take from a CLEC.
24 As a competitive matter, isn't the price that a CLEC
25 can charge an ISP constrained by the fact that the ISP

1 always has the option of going onto the BellSouth
2 network under the local business exchange tariffs?
3 A. Sure. Yes, that's correct.
4 Q. And paying the local business exchange tariffed rates?
5 A. That's correct.
6 Q. Now, this Commission, of course, has authority over the
7 local business exchange rates; doesn't it?
8 A. Yes.
9 Q. Now, Mr. - or excuse me. Dr. Taylor, I'll try not to
10 do that again. Will you agree with me that, if we have
11 two calls of equal length . . .
12 A. Equal duration.
13 Q. Equal duration. Thank you.
14 A. Right.
15 Q. Yes, we had that confusion . . . of equal duration, one
16 call going to an ISP, the other call staying as a
17 circuit-switched call and terminating at another end
18 user, both calls utilizing the same switching path and
19 the same amount of transport, that the costs of those
20 two calls are the same?
21 A. Yes, I think we can agree that the costs of the calls
22 are the same, but, of course, the calls are different
23 in other respects, mostly the regulatory respect that
24 the ESP exemption constrains pricing for one where it
25 doesn't the other.

1 Q. And I take it your notion would be that, because the
2 ESP exemption constrains the pricing for one and not
3 the other, that the ISP call, in essence, is a
4 subsidized call.

5 A. Yes. I believe it is the case that - well, in fact, I
6 know it is the case since, at the margin, most end
7 users pay zero for an ISP-bound call even of 20 minutes
8 duration that that particular call - the revenues the
9 carrier receives from that call does not cover its
10 costs; that costs are not zero.

11 Q. But, in a flat rated environment, the revenue is also
12 zero for a 20 minute call from one end user to another
13 end user; isn't that correct?

14 A. That's correct.

15 Q. And, if there is a subsidy, assuming, as you say, that
16 there is a subsidy on those Internet calls, the subsidy
17 would be to the cost causer who is obtaining service at
18 less than the costs that that cost causer is causing?

19 A. Well, let's be careful. The subsidy is to whoever
20 places Internet ISP-bound calls. So, ultimately, I
21 think, if you go and look and see who will end up
22 paying it and who will end up receiving it, it's
23 certainly being received by anyone who makes dial-up
24 ISP Internet calls. Who's paying it? Well, the whole
25 nexus of contribution that comes to local exchange

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carriers or any local exchange carrier who originates such calls, that's who's paying it.

MR. KRAMER:

If I could have just a moment to review some notes here? Madam Chairman, I have nothing further.

CHAIRWOMAN HELTON:

Thank you. Ms. Dougherty?

MS. DOUGHERTY:

No questions.

CHAIRWOMAN HELTON:

Thank you.

MR. KITCHINGS:

Just a moment, Chairman, if I may. No redirect, Chairman Helton. Thank you.

CHAIRWOMAN HELTON:

Thank you. Mr. Taylor, I believe you're dismissed.

A. Thank you.

MR. KITCHINGS:

BellSouth's next witness is David Coon, and Ms. Foshee will be handling the direct of that.

WITNESS SWORN

1 The witness, DAVID A. COON, after having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. FOSHEE:

5 Q. Please state your name for the record.

6 A. My name is David A. Coon.

7 Q. Mr. Coon, your business address, please?

8 A. It is 675 West Peachtree Street, Atlanta, Georgia
9 30375.

10 Q. Mr. Coon, did you cause to be prefiled in this
11 proceeding nine pages of rebuttal testimony and two
12 Exhibits?

13 A. I did.

14 Q. Do you have any changes or corrections to that
15 testimony?

16 A. Yes, I do. I have one minor change to my rebuttal
17 testimony.

18 MR. KRAMER:

19 I'm sorry. Where was that, Mr. Coon?

20 A. It's my rebuttal testimony. It's on Page 8, Line 2, at
21 the top. The words "explicit measurement by
22 measurement" should be replaced with "category by
23 category."

24 Q. Do you have any other changes or corrections?

25 A. No, I do not.

1 Q. Mr. Coon, for the record, could you state your position
2 with BellSouth?

3 A. I'm Director of Interconnection Services.

4 Q. Mr. Coon, if I asked you the same questions contained
5 in your rebuttal testimony from the stand today, would
6 your answers be the same?

7 A. They would be.

8 MS. FOSHEE:

9 I would like to move the rebuttal testimony and
10 two Exhibits of Mr. Coon into the record.

11 CHAIRWOMAN HELTON:

12 So ordered.

13 MS. FOSHEE:

14 Thank you. Mr. Coon is available for cross
15 examination.

16 CROSS EXAMINATION

17 BY MR. KRAMER:

18 Q. Good afternoon, Mr. Coon.

19 A. Good afternoon, Mr. Kramer.

20 Q. Mr. Coon, since we were together in Tennessee a couple
21 of weeks ago or so, BellSouth has filled in several of
22 the performance measures contained in your category-by-
23 category comparison in Exhibit 2; is that correct?

24 A. I believe it's the same Exhibit that we filed in
25 Tennessee. I could be mistaken, but I believe it's the

1 same one.

2 Q. Well, Mr. Coon, could you turn to your Exhibit 2?

3 A. I'm there.

4 Q. Let's work backwards if we can. Beginning on Page 4,
5 hasn't Category IX, poles, conduits, and rights-of-way,
6 been filled in?

7 A. Well, it may have been. Mr. Kramer, I don't recall
8 what was in Tennessee.

9 Q. All right. What about Category X, directory assistance
10 database?

11 A. Directory assistance, Category XI?

12 Q. I'm sorry; Category XI. I'm sorry. Excuse me.

13 A. That may have been. Again, I forget the timing. As we
14 discussed in Tennessee, our measurement process is
15 continuing to be enhanced associated with the needs of
16 the marketplace. So we're trying to be a little bit
17 more responsive here in this Exhibit.

18 Q. Well, Mr. Coon, there is a difference between being
19 responsive to the marketplace by updating standards and
20 filling in categories that were formerly empty; isn't
21 there?

22 A. Well, we're trying to provide a little clarity in our
23 measurements, and, as we talked about in Tennessee and
24 as I just amended my testimony, this Exhibit is a
25 category-by-category comparison, . . .

1 Q. Right.

2 A. . . . and you'll recall that we did volunteer to
3 provide a measurement-by-measurement comparison in
4 Tennessee, which will probably be much more responsive
5 than what this is.

6 Q. I'm aware of that. I was just trying, Mr. Coon, with
7 respect, again, just focusing for a moment on, for
8 example, Category XI, directory assistance database,
9 this is new information since Tennessee, isn't it, the
10 "Parity by Design - No distinction is made . . .,"
11 etc., language?

12 A. It may be. I will accept that it is.

13 Q. All right. Well, subject to check, would you agree
14 with me that that's also true for Category IX, poles,
15 conduits, and rights-of-way?

16 A. I will accept that, subject to check; yes.

17 Q. And XIII, NXX?

18 A. Yes.

19 Q. And XIV, bona fide request?

20 A. Yes, I would.

21 Q. And all of VII, local number portability, on Page 3?
22 Excuse me.

23 A. Yes, I would.

24 Q. Now, Mr. Coon, do you recall, when we were in
25 Tennessee, we also asked you about a number of

1 measurements with aspects that were still under
2 development?
3 A. I do.
4 Q. And the aspects that were under development were things
5 like benchmarks and/or levels of aggregation?
6 A. Yes, I do.
7 Q. Do you know if any of the 21 measurements that were
8 under development that we referred to there have been
9 filled in since Tennessee?
10 A. Let me restate your question, where we have categories
11 under development associated with the measurements. I
12 think what you're asking me is have we done any more
13 work in that area; not the measurements themselves.
14 Q. Not the measurements themselves?
15 A. The measurements themselves are essentially complete,
16 and the answer to your question is yes. As a matter of
17 fact, today, if I'm not mistaken, we are filing
18 benchmarks, where we do not have retail analogs, in the
19 Louisiana Commission associated with the Louisiana
20 Workshop. Now, let me mention that we have - if I
21 could take two to three minutes just for a little
22 clarification here, the benchmarks we are producing is
23 where we don't have a retail analog, and we have a
24 number of processes here where you don't have an
25 analogous retail process. In Kentucky, I looked at the

1 October data, and about 96 percent of the activity in
2 October in Kentucky was resale, either resale business,
3 resale residents, or resale design, and the definition
4 of the benchmark there is parity with retail. So 96
5 percent of the time in Kentucky the measurements that
6 we're producing today have a benchmark and that's
7 parity with BellSouth retail. We're producing about
8 8,000 numbers a month at the state level in Kentucky,
9 and, if the Commission staff has been into PMAP and
10 looked at the numbers, they probably have seen a number
11 of those numbers. We don't have product disaggregation
12 currently on some of the products that Ms. Rowling
13 mentioned this morning, but we're probably talking
14 about less than 1 percent of the activity that would be
15 in a typical state, such as Kentucky.

16 Q. When you say that you have all those developed, Mr.
17 Coon, that is still - as we just discussed, many of
18 them are very recent and are just being completed as
19 we're speaking, even; isn't that correct?

20 A. Yes, you're right, and let me clarify if you will allow
21 me.

22 Q. Excuse me. I'm sorry.

23 A. The local number portability measurements, we do plan
24 to produce measurements on local number portability
25 starting the middle of this month, and the reason it

1 has taken until December to do that is because an
2 industry forum was established sometime back to
3 establish the procedures to put in local number
4 portability or to put it in service, and, until those
5 procedures are fully functional and developed, you
6 can't measure the processes. The procedures were put
7 into place, formalized earlier this year, and we
8 determined they have got a way to measure it. The
9 benchmarks, we didn't think it would be fair to
10 establish benchmarks unless we had adequate data, and
11 we have roughly 18 months' worth of data now, and we
12 think that we can probably establish some benchmarks.
13 In fact, in the Louisiana Commission Workshop, we
14 proposed a set of retail analogs back as early as March
15 of this year to a number of CLEC participants there,
16 and we've been negotiating with them ever since to try
17 to get a set of benchmarks just for Louisiana which we
18 would hope would have regional applicability.

19 Q. Well, Mr. Coon, you mentioned Louisiana. Isn't it true
20 that, in Louisiana, the CLECs who are involved there
21 have not yet signed off on or are not yet in agreement
22 with either the performance measures or the benchmarks
23 that have been proposed?

24 A. That's partially correct. The benchmarks that we are
25 producing in Louisiana are as a result of the Louisiana

1 Commission Order. There was a hearing that was held
2 back in 1998. An Order resulted from that, and our
3 measurements in Louisiana are consistent with that
4 Order. The workshop was a part of that Louisiana
5 Commission Order to refine, clarify, understand the
6 measurements. So the measurements themselves are
7 consistent with what the Commission ordered. You are
8 correct that the benchmarks - we're still in the
9 negotiation process with the CLECs, and, as I mentioned
10 earlier, we've been going through that since early this
11 year.

12 Q. And aren't there still some negotiations regarding a
13 number of the performance measures as well?

14 A. Yes. Yes. That workshop is still underway.

15 Q. And I take it you're also doing a workshop in Florida
16 where you've just received, I believe on November 19, a
17 series of comments from CLECs who are not happy with
18 the BellSouth proposed service quality measures.

19 A. You're right. I don't believe I would couch the term
20 as being not happy with the measurements. The purpose
21 of the workshop in Florida, which the first day of
22 which was yesterday, is that we have been ordered to
23 conduct third-party testing in Florida of our operation
24 support systems, much as we're doing in Georgia, and
25 Florida has not had a generic docket or a performance

1 measurements docket. So the question is, if you're
2 going to have a third-party test, what do you use as a
3 measure of success. That's the purpose of the
4 workshop, is to develop some interim measurements until
5 those performance measurements can be formalized in a
6 generic docket, which will probably be later, well, in
7 the year 2000 sometime.

8 Q. And, speaking of the year 2000, it's also my under-
9 standing that the measurements in Louisiana are not
10 scheduled to go to final hearing until May, 2000; isn't
11 that correct?

12 A. That's correct.

13 Q. So there's still a lot of work to be done on the
14 performance measurements and on the benchmarks; is that
15 correct?

16 A. Well, as I mentioned earlier, these measurements,
17 whether you take Texas' measurements or whether you
18 take Georgia's measurements, which you all agreed to in
19 Georgia, if you recall, to accept our measurements, or
20 whether you . . .

21 Q. I'm sorry. Go ahead. Excuse me.

22 A. . . . take a Louisiana set of measurements, I think it
23 would be a mistake to say that they're cast in
24 concrete; they're never going to change. They're
25 always going to be evolving to react to new market

1 conditions, new products, new needs for measurements,
2 etc.

3 Q. But we're not just talking about evolution. Mr. Coon,
4 isn't it correct that the issue here is whether the
5 standards are as complete and as comprehensive as the
6 CLECs would like to see them?

7 A. Well, again, the performance measurements, the purpose
8 of performance measurements, is to enable the
9 Commission to detect nondiscriminatory access in a
10 consistent manner, and, once again, if you look at
11 everything that we're doing, we're capturing 96
12 percent, just based on October data in Kentucky, of the
13 data that this Commission would need to detect
14 nondiscriminatory access. We're not going to measure
15 everything. I mean, as I stated before, we've got
16 almost 8,000 numbers out there and that's an awful lot.
17 If we continue to add more and more and more things to
18 it, the question that you need to ask yourself is does
19 it clarify or does it confuse the situation in
20 detecting nondiscriminatory access.

21 Q. And the position of the CLECs, of course, in these
22 proceedings, Mr. Coon, has been that a number of these
23 measures are needed in order to clarify; isn't that
24 right, as opposed to confuse?

25 A. It's a collaborative process. The CLECs have their

1 needs, and we're trying to meet them as best we can.

2 Q. Mr. Coon, on Page 6 of your rebuttal testimony, and I'm
3 on Lines 12 and 13, you refer to the fact that there
4 are in excess of 70 CLECs in Kentucky who have already
5 signed agreements with BellSouth that include the
6 BellSouth SQMs. Do you know how many of those CLECs
7 are actually active?

8 A. No, sir, I don't. I would guess that there's probably
9 30 or 40. The difference is those CLECs have signed a
10 regional agreement which would have applicability in
11 Kentucky, once the CLEC is certified here.

12 Q. So many of them would not yet even be certified in
13 Kentucky?

14 A. Some of them; you're correct.

15 Q. Mr. Coon, let me direct your attention to Page 8 of
16 your rebuttal testimony, and I'm in the answer that
17 begins on Line 18. You are describing the levels of
18 delineation in the BellSouth SQMs. You say there are
19 six. Now, with respect to the levels of disaggre-
20 gation, which is No. 5, that is, of course, one where
21 there is still significant development work going on;
22 isn't that correct?

23 A. As we discussed, there are some products which we are
24 disaggregating, local number portability being one. We
25 are breaking out some UNE, unbundled network elements.

1 I don't know that I would categorize that as being
2 substantial. Again, in Kentucky, 96 percent of the
3 measurements today are readily identifiable by a unique
4 product set.

5 Q. And the same is true with respect to benchmarks; isn't
6 it? That is, that the benchmarks are also still - many
7 of those are still under development; isn't that
8 accurate?

9 A. We are in the process of developing benchmarks; that is
10 correct.

11 MR. KRAMER:
12 I think I have nothing further, Madam Chairman.

13 MS. DOUGHERTY:
14 No questions, Your Honor.

15 CHAIRWOMAN HELTON:
16 Thank you. Redirect?

17 MS. FOSHEE:
18 Yes, just a few questions. Thank you.

19 REDIRECT EXAMINATION

20 BY MS. FOSHEE:
21 Q. Mr. Coon, Mr. Kramer asked you whether, I think it was
22 he said, there was a lot of work left to do on
23 BellSouth's measurements. Is it BellSouth's position
24 before this Commission today that its SQMs, as
25 presented, are appropriate to assess nondiscriminatory

1 access?

2 A. Absolutely.

3 Q. And have you compared BellSouth's SQMs with ICG's

4 proposal to confirm your opinion that they're

5 sufficient to assess nondiscriminatory access?

6 A. Yes, I did.

7 Q. Okay. Is that your DAC-2?

8 A. No, it was not. That was a category-by-category

9 comparison. We are in the process, as Mr. Kramer

10 mentioned earlier - we were asked in the Tennessee

11 proceeding to do just that, to make a measurement-by-

12 measurement comparison, and we're in the process of

13 doing that and have it largely complete.

14 Q. Is that something you could provide to this Commission

15 if this Commission were so interested?

16 A. Certainly could.

17 Q. Okay. And then Mr. Kramer asked you some about the

18 Louisiana collaborative process. Is it a fair

19 statement to say that BellSouth's SQMs are the result

20 of collaborative work with the CLEC community?

21 A. I would say, yes, that is an accurate statement. It's

22 the result of collaborative work if you want to use

23 hearings. That would fall in that definition in four

24 states, including the Louisiana Workshop, in which

25 CLECs, BellSouth, all parties had an opportunity to

1 present their views, and our measurements are a result
2 of that.

3 MS. FOSHEE:
4 Thank you. I have no further questions.

5 CHAIRWOMAN HELTON:
6 Mr. Coon, you will provide the Commission, please,
7 with a category-by-category comparison that you're
8 going to do in Tennessee.

9 A. Yes. Yes, we will.

10 CHAIRWOMAN HELTON:
11 Thank you.

12 VICE CHAIRMAN HOLMES:
13 When do you hope to have that completed? Do you
14 have any idea?

15 A. It's complete in draft form as we speak. I believe we
16 have to file it with the Tennessee Commission next
17 week, I think, December 8, if I'm not mistaken, and we
18 can provide it at that time.

19 CHAIRWOMAN HELTON:
20 At the same time? Thank you. Recross?

21 MR. KRAMER:
22 No. No.

23 CHAIRWOMAN HELTON:
24 Thank you, Mr. Coon.

25 A. Thank you.

1 MR. KRAMER:
2 Madam Chairman, may we have just a minute?
3 CHAIRWOMAN HELTON:
4 Yes.
5 MR. MERSHON:
6 Madam Chairman, while they're conferring, we had
7 an additional witness, Ms. Caldwell, and I believe
8 that Ms. Caldwell would be stipulated. It was our
9 understanding that she would . . .
10 MR. KRAMER:
11 She's stipulated.
12 MR. MERSHON:
13 She's stipulated, and . . .
14 CHAIRWOMAN HELTON:
15 Correct.
16 MR. MERSHON:
17 . . .so we would move her testimony into the
18 record as stipulated.
19 CHAIRWOMAN HELTON:
20 So ordered. Are you ready, Mr. Kramer?
21 MR. KRAMER:
22 Yes. Thank you.
23 CHAIRWOMAN HELTON:
24 Okay. Call your witness.
25

1 MS. FOSHEE:

2 Would you like to swear him?

3 CHAIRWOMAN HELTON:

4 Yes.

5 WITNESS SWORN

6 The witness, JERRY D. HENDRIX, after having been
7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MS. FOSHEE:

10 Q. Please state your name for the record.

11 A. My name is Jerry D. Hendrix.

12 Q. And your position with BellSouth?

13 A. I'm Senior Director, Interconnection Services.

14 Q. And could you state your business address, please?

15 A. Yes. It is 675 West Peachtree Street, Atlanta,
16 Georgia.

17 Q. Mr. Hendrix, did you cause to be prefiled in this
18 proceeding 53 pages of direct testimony?

19 A. Yes, I did.

20 Q. And did you have nine Exhibits to that testimony?

21 A. Yes, I did.

22 Q. Do you have any changes or corrections to your direct
23 testimony?

24 A. No, I do not.

25 Q. And did you also cause to be prefiled 50 pages of

1 rebuttal testimony?
2 A. Yes, I did.
3 Q. And two Exhibits to that testimony?
4 A. That is correct.
5 Q. Do you have any changes or corrections to your rebuttal
6 testimony?
7 A. No, I do not.
8 Q. Mr. Hendrix, if I asked you today from the stand the
9 same questions contained in your direct and rebuttal
10 testimony, would your answers be the same?
11 A. Yes, they would.
12 MS. FOSHEE:
13 I would like to move his direct and rebuttal
14 testimony plus 11 Exhibits into the record.
15 CHAIRWOMAN HELTON:
16 So ordered.
17 MS. FOSHEE:
18 Mr. Hendrix is available for cross examination.
19 CHAIRWOMAN HELTON:
20 Mr. Kramer?
21 MR. KRAMER:
22 Thank you.
23
24
25

1 CROSS EXAMINATION

2 BY MR. KRAMER:

3 Q. Mr. Hendrix, I would like to start by asking you a few
4 questions about your Exhibits JH-4. I'm sorry; it's
5 JH-5.

6 A. Yes, sir, I have it. I also have a larger copy. I
7 don't know if it would be of any use here or if this is
8 fine.

9 CHAIRWOMAN HELTON:

10 I think we have them.

11 A. Okay.

12 Q. All right. Now, Mr. Hendrix, focusing, first, on
13 Diagram B of your Exhibit JH-5, this is a situation you
14 have where you are illustrating the payment of
15 reciprocal compensation, and the way you've drawn it,
16 it's a two-way diagram. I would like to just work from
17 the left to the right, if that's okay. So we'll just
18 have the traffic flowing in that direction for the
19 moment.

20 A. That's fine.

21 Q. Okay. Now, in this situation, an end user on the ILEC
22 network initiates a call that goes to the ILEC central
23 office, through the tandem, to a CLEC end office and on
24 to the end user, and you will agree that there is
25 reciprocal compensation paid in this situation?

1 A. For local calls, that is correct.

2 Q. Yes, for local calls. Now, in this situation, am I
3 correct that the reason reciprocal compensation would
4 be paid is because the terminating CLEC in this diagram
5 would be incurring transport costs between the ILEC
6 tandem and the CLEC end office and switching costs to
7 terminate the call to the end user on the right side of
8 the diagram?

9 A. That is right and, again, that is for local calls, true
10 local calls, as contemplated per the Act.

11 Q. That's contemplated what?

12 A. Per the Act.

13 Q. Per the Act. Mr. Hendrix, would you agree with me
14 that, in this situation, because BellSouth is not
15 incurring the cost of terminating the call - assuming
16 cost-based rates, because BellSouth is not incurring
17 the costs of terminating the call and, if it sends the
18 call to a CLEC, it saves the cost - excuse me - it does
19 not incur the costs of terminating the call, it is
20 therefore indifferent as between terminating the call
21 and sending the call to the CLEC for termination?

22 A. I think there were about five parts to that question.

23 Q. There are a lot of pieces to hold together. Do you
24 want me to try it again?

25 A. If it's okay, if I could just state it, and you could

1 tell me if I'm . . .

2 Q. Sure. Sure.

3 A. . . . capturing what you're asking. I believe what
4 you're asking is, is BellSouth agreeing to compensate
5 the CLEC that is on the right for this call for the
6 costs the CLEC is incurring in transporting and
7 terminating that call, and the answer is yes. For true
8 local calls, we are agreeable. I did not understand
9 the part about being indifferent.

10 Q. All right. Well, let me try that again. Assuming
11 cost-based rates, if BellSouth terminated the call
12 itself as in Diagram A, BellSouth would incur the
13 termination costs on the right side of the diagram. In
14 Diagram B, BellSouth does not incur those termination
15 costs, assuming cost-based rates, so that it pays the
16 CLEC the same rate to terminate the call as BellSouth's
17 savings because it does not have to terminate the call.
18 Shouldn't BellSouth be indifferent as to whether it
19 terminates the call or it sends the call to the CLEC
20 since the cost is the same to it in either case?

21 A. Based on your assumption, I would say, for true local
22 calls, BellSouth, based on the rates assuming cost-
23 based rates, would, in fact, recover its costs from the
24 end user in Diagram A and, in Diagram B, will pay the
25 CLEC for terminating that call because BellSouth is not

- 1 incurring those costs to terminate the call to the end
2 user. I hope that's responsive to what you're asking.
- 3 Q. Yes, it is.
- 4 A. Thank you.
- 5 Q. And I take it we would agree that that's an acceptable
6 result because the guiding principle here is that
7 everyone is compensated for the costs they incur in
8 terminating the call, in originating and terminating
9 the call; excuse me.
- 10 A. The answer is yes, but it must be qualified, and it's
11 qualified to the point that, in this case, you have a
12 true local call, and BellSouth will bill the end user
13 whatever BellSouth is authorized to bill the end-user
14 customer. So it's actually getting its money from the
15 end-user customer. BellSouth is not incurring costs in
16 Diagram A that it's not recovering, making these same
17 assumptions, from the end-user customer. In Diagram B,
18 while BellSouth is still getting money from the end-
19 user customer, BellSouth is compensating the CLEC on
20 the far right because of the costs the CLEC is actually
21 incurring for true local traffic.
- 22 Q. And so each party to the transaction is recovering or
23 being compensated for its costs?
- 24 A. The answer is yes, using your assumptions.
- 25 Q. And, just to finish the question, BellSouth and the

1 CLEC?

2 A. Yes, using your assumptions, I would agree.

3 Q. Right. I think this is the last one on this particular

4 point, but I take it we would also agree that, in

5 Diagram B, as contrasted with Diagram A, because the

6 CLEC is incurring costs to terminate a call from a

7 BellSouth subscriber, it is appropriate for the CLEC to

8 get reciprocal compensation.

9 A. And the answer is yes, but you have contrasted Diagram

10 B with Diagram A, and I think the critical thing to

11 point out in contrasting the two is that Diagram B you

12 have arrows going to the right as well as to the left

13 and that's assuming that both parties would have

14 traffic going back and forth and, as such, both parties

15 would compensate each other for traffic that is

16 transported and terminated on the other party's

17 network.

18 Q. Yes. I understand that's your assumption. I was just

19 focusing on a call, for the moment, moving from the

20 left to the right to simplify.

21 A. Yes, sir.

22 Q. Okay. Now, if there were no - well, let's go to

23 Diagram F for a moment.

24 CHAIRWOMAN HELTON:

25 Which Exhibit?

1 MR. KRAMER:

2 I'm sorry. Excuse me. It's Exhibit JH-7. It's
3 two pages over.

4 Q. Would you agree with me that what is, in Diagram F,
5 characterized as the ICO/CLEC - would you agree with me
6 that the ICO/CLEC in Diagram F as well as the CLEC in
7 Diagram B both incur costs in switching and delivering
8 the traffic coming from the left side of the diagram?

9 A. I would agree that they both could, in fact, recover
10 costs, but there is a major difference in that you're
11 talking two different kinds of traffic, and you're
12 comparing apples and oranges, but I would agree that
13 they both do, in fact, incur costs.

14 Q. They both do incur costs?

15 A. That's correct.

16 Q. And I take it you would agree with me that the
17 functionality in delivering the calls in Diagram F and
18 Diagram B is the same.

19 A. No, I would not agree that they are the same. I would
20 agree that they are similar, but they're not the same.

21 Q. Well, if we go through it, Mr. Hendrix, isn't it true
22 that, in each case, you have a call that traverses a -
23 and just focusing on the terminating side of the call
24 here or on the end side of the call, . . .

25 A. Is that the side to the right you're speaking of?

1 Q. To the right, yes.

2 A. Yes, sir.

3 Q. . . . would you agree with me that you have a call that
4 goes through a tandem switch to an end office on to a
5 user premises?

6 A. I would agree that you have a call going through the
7 tandem switch. There is also an office on the right as
8 indicated by the circle in both diagrams, but then,
9 once you get beyond that circle, while it is similar,
10 the functions are slightly different in that, one, if
11 you were to look at Diagram B on JH-5, there is a
12 different type of service going to that end-user
13 customer than the service that is likely to go from the
14 end office denoted with a circle, the ICO/CLEC end
15 office. It's a different type of service. Also the
16 functions that are performed in the Diagram F, on the
17 far right, is, of course, different. So I would say
18 they are similar, but they are different, and the fact
19 is it's difficult beyond the tandem to draw a parallel
20 between Diagram F and Diagram B.

21 Q. Well, let's just focus, if we might, Mr. Hendrix, on
22 the technical functionality. I understand you have
23 some issues with respect to whether the service is the
24 same, and I want to just put those aside for the
25 moment. I understand that's an issue, and I understand

1 you're not conceding anything with respect to the
2 service, and I just want to focus on the technical
3 functionality and on the network characteristics of the
4 call, if we might, and, again, focusing at that level
5 and assuming that there is equal distances of transport
6 and roughly equal loop lengths involved in both the
7 call in Diagram B and the call in Diagram F, would you
8 agree with me that a call traverses the ILEC tandem and
9 is transported to an end office and goes and is then
10 delivered - let me use that phrase - by that end office
11 to a premises? Now, would you agree with me that far?
12 A. No, I can't go that far. Just as I previously
13 mentioned, the functions are very similar, but, when
14 you look at the services that are being ordered by the
15 customer to complete that call from the tandem out,
16 they could be quite different. I don't want to argue
17 that they aren't similar. I have a problem with them
18 being the same.
19 Q. Well, Mr. Hendrix, let me be clear. I'm not trying to
20 focus on the service. I'm just trying to focus on what
21 happens with the technical characteristic. The call
22 goes to the tandem. It's transported. It goes to an
23 end office, and it's then delivered to a premise. Now,
24 I understand you have an issue with what happens once
25 it gets to that premise. I understand that, but would

1 you agree with me that, until it gets to that premise,
2 the technical functions performed on the local exchange
3 carrier network, just the technical functions, ignoring
4 the service for the moment, the technical functions are
5 the same; would you agree with me on that?
6 A. Okay. Let me see if I can help to draw this to
7 closure. I would agree that they're very similar. I
8 would agree that you have end office switching on the
9 left. You have tandem switching on both calls on the
10 right. You have a switching function that is taking
11 place at both end offices with the circle, and then you
12 have a premise on the right; one is the carrier, and
13 one is the end user. I would agree that, from that
14 standpoint, if I can draw a closure to that, that those
15 functions are very similar and, in many cases, one
16 would argue that they could very well be the same.
17 Q. They could very well be identical?
18 A. That's correct,
19 Q. And, just accepting for the moment your characteri-
20 zation of a carrier on one end - I understand and I
21 appreciate your effort to try to work that through -
22 and since those functions would be the same and we've
23 agreed they could be identical, the costs involved
24 would be the same?
25 A. Not necessarily; no. They could be very similar, but

1 that has a lot to do with the service that is being
2 terminated and how that service is being transported.

3 Q. Well, let me rephrase the question. I think I
4 understand what's troubling you. The costs incurred in
5 performing the functions - the costs incurred by
6 switching the call, by transporting it, and then by
7 delivering it over the loop - are the same for the two,
8 ignoring . . .

9 A. No, sir, they're not.

10 Q. And why not?

11 A. They could be different because the service that is
12 going between the end office and the customer prem, on
13 one side you have a voice grade type service, which is
14 in Diagram B, and, in Diagram F, you may have a DS1 or
15 you may have a DS3 that's capable of carrying far more
16 than a single call path. So they're vastly different.
17 So their costs are different because the bases that
18 you're starting with are totally different.

19 Q. Well, Mr. Hendrix, I'm just focusing on a circuit-
20 switched call going to an ISP, and I'm just focusing on
21 the circuit-switched aspect of it between the tandem
22 and the time it gets to, in Diagram F, the box marked
23 "ISP or IXC" and, in Diagram B, the box marked "End
24 User," and, assuming those are just standard voice
25 grade circuit-switched calls, assuming again equal loop

1 length, equal transport, wouldn't you agree with me
2 that the costs up to that point are the same?
3 A. No, sir, I cannot because they're ordering different
4 services. I'm really trying to be . . .
5 Q. I'm . . .
6 A. I'm trying to answer the question, but they're ordering
7 different services. End users do not order DS1s and
8 DS3s or OC48s, while an ISP with the type of traffic
9 terminating to the ISP premises will order something
10 that's vastly different. So, on a per minute of use
11 basis, the basis that you're using to come up with
12 costs are totally different.
13 Q. But, Mr. . . .
14 A. They will be similar. The functions are similar in
15 that you would have tandem switching. You will have
16 end office switching. You will have end office
17 switching on the far left, but, once you get to the
18 transport service that's actually used to move that
19 call from the tandem switch to the prem it's totally
20 different. The calls may be similar in that the
21 functions may be similar, but the bases that you're
22 starting with is totally different.
23 Q. But, Mr. Hendrix, I'm assuming that we're dealing with
24 a voice grade circuit in both cases. I'm assuming
25 we're dealing with a voice grade circuit, a call that

1 goes all the way to the end user's premises, in Diagram
2 B, all the way to the end user's premises, is a voice
3 grade circuit, and a call that goes all the way to the
4 right side of Diagram F is a voice grade DS0. I'm just
5 assuming a normal circuit-switched dial-up Internet
6 access call from an end user that goes . . .

7 A. For the sake of this example, we can make those
8 assumptions as to just that they are but I'll be
9 willing to make those assumptions for the sake of
10 moving on, if you would like.

11 Q. Okay. Thank you. Okay. Now, you mentioned, in
12 connection with Diagram F, that you thought that, in
13 that situation, there would be no compensation. In
14 Diagram F, I'm talking about now.

15 A. Yes, sir, I did.

16 Q. Because the point that the call is delivered to, in
17 Diagram F, is a carrier; is that correct?

18 A. That wasn't the only reason I mentioned that. I would
19 agree, yes, that the point or the customer on the far
20 right is, in fact, a carrier, but the reason no
21 compensation is due is, in this example, you're looking
22 at ISP-bound traffic, and the FCC has made it very
23 clear, I believe, in Footnote 87 of the ruling that
24 came out in February of '99 that ISP traffic is
25 nonlocal interstate traffic. So we're talking access

1 traffic here, and the arrangement that you have here is
2 very similar to other access arrangements, wherein the
3 cost causers would, in fact, compensate those that are
4 incurring costs, and what should actually happen in
5 this diagram is the CLEC, and ISP is a customer of the
6 CLEC, the CLEC should actually compensate BellSouth
7 because the CLEC is receiving \$19.90, or whatever, from
8 the end-user customer. BellSouth is transporting and
9 switching a call. They get nothing for that call. The
10 CLEC is - when I say "\$19.90," the ISP is getting that
11 on a monthly basis from the end-user customer, and the
12 CLEC is getting from the ISP, if you look at Diagram F,
13 the piece between the ISP and the end office here.
14 They get that piece based on the service that is
15 actually ordered whether it's a DS1, DS3, or whatever.
16 So the only person that's not being compensated here is
17 BellSouth, but the bottom line is the FCC has classed
18 these to be interstate access calls and local traffic.
19 It isn't. So compensation isn't due.

20 Q. Mr. Hendrix, what you've basically just done is
21 summarized your second alternative; is that right?

22 A. I may have. I'm not certain.

23 Q. Okay. Now, to go back to the question, focusing again,
24 it's your contention that the ISP, in essence, is
25 functioning as a carrier there; is that correct?

1 A. Yes, it could be, definitely, because he's transporting
2 the call onto the World Wide Web. If you were to draw
3 another circle on the right side beyond the "ISP or
4 IXC," he has to have some transport to get onto the
5 World Wide Web where that call would terminate.

6 Q. Right. Well, didn't your analysis that you just went
7 through in response to not just the last question but
8 the prior one, when you summarized your Alternative 2,
9 didn't your analysis assume that the use being made by
10 the ISP of the network, everything to the left of the
11 little stop sign box, where you have "ISP or IXC,"
12 everything to the left of that, that that is the use of
13 the network that's essentially the same as an IXC makes
14 of the network? Isn't that your assumption? That
15 the . . .

16 A. I said the functions . . .

17 Q. I'm sorry. Excuse me.

18 A. I'm sorry.

19 Q. I was just going to say that the ISP's use of the
20 network is essentially the same as an IXC's and
21 therefore it ought to be treated as access.

22 A. I think what I mentioned, and I'm not sure which
23 example you're going back to, but the example I just
24 gave would indicate that this service that is being
25 offered is more of an access service similar to other

1 access services that are offered.

2 Q. And wouldn't that be because the use the ISP makes of
3 the network looks just like an IXC's use of the
4 network?

5 A. I'm not certain that I follow your question. I'm
6 sorry, but the ISP, in this case, is ordering the
7 service from the CLEC customer, . . .

8 Q. Right.

9 A. . . . let's say ICG, to get the call moving from the
10 left to the right from the CLEC's end office to the IXC
11 or the ISP premises.

12 Q. And, under your analysis, what you want to do is treat
13 this ISP just like an IXC?

14 A. I want to treat it the way it should be treated, and
15 I'm not certain that I understand the question or
16 whether I would even agree. I would like very much to
17 treat it the way it should be treated, but the bottom
18 line as to how BellSouth would like to treat it, it
19 doesn't really matter. The fact of the matter is this
20 is more of an access call, and the FCC has made it
21 clear that it's not local, and the FCC has jurisdiction
22 over this call, and I believe Footnote 87 classes it as
23 a nonlocal interstate call, which is more access.

24 Q. And I take it you would agree with me that the FCC has
25 also said that this is not going to be treated like an

1 access call.

2 A. What they have actually - I don't know that I would
3 agree totally with what you've stated. I think what
4 they have stated is, for an interim period, they will
5 not allow access charges to be assessed. They have not
6 indicated that they will not treat it as an access
7 call. We're not certain what they're going to do.

8 Q. Well, isn't it true that it is classified for
9 separation purposes as a local call?

10 A. No, it's not.

11 Q. You mean, that the . . .

12 A. No, it's not. What the FCC ordered was to preclude any
13 shock to customers, and, to allow this type of service
14 to get up and running, they would allow ISPs, for a
15 period of time, to order services from the basic
16 service tariff, and, for that reason, in lieu of paying
17 access charges, they are allowed to purchase these
18 services. We do not treat it as local. We treat the
19 services that they order, which is to access the
20 vehicle that the carriers use, as local, but this
21 traffic is not treated as local.

22 Q. Isn't the traffic recorded for separation purposes as
23 local?

24 A. No.

25 Q. It's not?

1 A. The facilities that they use is recorded as local. If
2 there is any measured service customers, then, yes,
3 they would use that local traffic, and it's shown as
4 local, but I think . . .

5 Q. I'm sorry.

6 A. . . . that - measured service, . . .

7 Q. Measured service.

8 A. . . . measured service, yes, but I believe the
9 penetration on that may be small, but the bottom line
10 is, in lieu of paying access charges, the FCC ordered
11 that they would be allowed to purchase services from
12 the basic service tariff, and, in my mind, that's
13 simply a surrogate for an interim period for access.

14 Q. When did the FCC do that, Mr. Varner?

15 A. Mr. Varner?

16 Q. I'm sorry; Mr. Hendrix.

17 A. I'm not certain if you insulted me or Mr. Varner.

18 Q. I'm sorry. I'm sorry. I've seen a lot of Mr. Varner
19 sitting in that chair.

20 A. Mr. Varner and I are friends. In fact, we went to the
21 same school. In fact, I used to work for him. What
22 was your question? I'm rattled.

23 Q. When did the FCC grant this temporary exemption?

24 A. I believe it dates back to 1983.

25 Q. 1983?

- 1 A. That's correct.
- 2 Q. That was the interim exemption?
- 3 A. That is correct.
- 4 Q. And, Mr. Hendrix, just to go back, isn't it true a
5 moment ago you said that it would not be the usage; it
6 would be the facilities in a measured environment that
7 were classified as local because of the ESP exemption?
- 8 A. No. I think I said two things. I think I said, first,
9 the services that they order, which is a surrogate for
10 access, those services, since they are purchased out of
11 the local tariff, would be treated as local.
- 12 Q. Right.
- 13 A. In cases where you have measured service and we have to
14 show those minutes of use for measured service, and I
15 believe the penetration is very low, then that is
16 probably shown as local, but ISP traffic itself, while
17 it may be shown in ARMIS or whatever else as local
18 because we were ordered to, the FCC has long held this
19 to be interstate nonlocal traffic.
- 20 Q. But it is treated as local for purposes of, for
21 example, separations? Didn't you just agree with me on
22 that?
- 23 A. The services that they order, yes, are treated as
24 local.
- 25 Q. The services that they order and the revenues and the

1 costs incurred in providing the service are treated as
2 local; isn't that correct?
3 A. That's correct and that, too, is the result of us being
4 ordered to treat it in that fashion.
5 Q. Okay. Now, Mr. Varner - I'm going to keep doing it
6 now.
7 A. I could dye my hair, if you would like.
8 Q. I used to be able to say that, too, Mr. Hendrix. Now,
9 Mr. Hendrix, you said a moment ago that BellSouth is
10 not compensated for this traffic; is that right?
11 A. Yes, sir, I did.
12 Q. And so is it your contention that BellSouth is losing
13 money on this traffic?
14 A. I have never been asked that question, and this is my
15 personal answer on the spur of the moment. Since that
16 traffic is not considered as part of what we do in
17 residually pricing our basic service rates and we incur
18 costs, I would venture to say that perhaps we are.
19 Q. And isn't it true that the FCC just recently, in 1997,
20 again affirmed its treatment of ISPs as end users
21 exempt from access?
22 A. I'm not certain as to the exact words, but the Order
23 that you are referring to, and it uses different words
24 throughout the Order, . . .
25 Q. Yeah.

1 A. . . . so taking just one cite is not appropriate, the
2 intent of what they did was to affirm what they did
3 back in the eighties and that was simply to allow ISPs
4 to purchase basic services for the purposes of having
5 their end users access them, and they may have used end
6 users and, in other places, they said strictly for the
7 purpose of end users accessing them and to exempt these
8 carriers from the payment of access charges.

9 MR. KRAMER:
10 Madam Chairman, may I approach the witness?

11 CHAIRWOMAN HELTON:
12 Yes.

13 MR. KRAMER:
14 Madam Chairman, I've handed the witness an excerpt
15 from the FCC Access Charge Reform Order of May 16,
16 1997, which is recorded at 12 FCC Record 15982
17 (1997).

18 Q. Mr. Varner, could I

19 CHAIRWOMAN HELTON:
20 Mr. Hendrix.

21 Q. Jesus! Mr. Hendrix, could I ask you to look at
22 Paragraph 346 of this Order which appears on Page
23 16133?

24 A. Yes, sir, I have that.

25 Q. Could you read the first few sentences of that?

1 A. Yes. "We also are not convinced that the nonassessment
2 of access charges results in ISPs imposing
3 uncompensated costs on incumbent LECs. ISPs do pay for
4 their connections to incumbent LEC networks by
5 purchasing services under state tariffs."
6 Q. Would you mind to keep going?
7 A. I thought you said the first two sentences.
8 Q. I'm sorry.
9 A. "Incumbent LECs also receive incremental revenue from
10 Internet usage through higher demand for second lines
11 by consumers, usage of dedicated data lines by ISPs,
12 and subscriptions to incumbent LEC Internet access
13 services."
14 Q. Mr. Hendrix, isn't it also true that BellSouth has been
15 the beneficiary of an upsurge in its sale of second
16 lines and revenue from second lines?
17 A. I believe that is the case, yes, but I wouldn't say
18 that it's largely because of what the CLECs have
19 brought to the market. We've made a big effort to
20 encourage people to purchase second lines wherein they
21 will be able to use the Internet and access the
22 Internet services but also for other members of the
23 family.
24 Q. And, of course, BellSouth has its own ISP in the form
25 of BellSouth.net; doesn't it?

1 A. Yes, we have that service we do offer.

2 Q. And so BellSouth also generates substantial revenue
3 from subscriptions to incumbent LEC Internet access
4 services?

5 A. Would you say that again? I'm sorry.

6 Q. I was reading from the last part of the last sentence
7 you read, Mr. Hendrix; that the incumbent LECs generate
8 subscriptions - I am now quoting, ". . . subscriptions
9 to incumbent LEC Internet access services." That would
10 be to BellSouth.net; wouldn't it?

11 A. Yes, sir, that is the case. I think, in order to put
12 this Order in its proper context, while we have
13 additional lines, we also have BellSouth.net which is a
14 service we offer. What is being asked for here is for
15 us to incur additional costs for revenues that we do
16 not get to cover those costs and for costs that the
17 CLEC and the ISPs receive revenues to cover, and
18 BellSouth is the only one that is not compensated for
19 its costs in this arrangement.

20 Q. Of course, the FCC seems to feel you're getting amply
21 compensated from other sources based on what we've just
22 read; isn't that correct?

23 A. I think that's taking it out of context. I think that
24 is looking strictly before CLECs came into the market
25 asking that we compensate them for traffic that is

1 MS. FOSHEE:

2 Which page?

3 MR. KRAMER:

4 Page 5; I'm sorry.

5 Q. Mr. Hendrix, looking at Line 8, you have a quote there
6 that reciprocal comp payments could reach \$2.6 billion
7 by the year 2002; do you see that?

8 A. Yes, sir.

9 Q. Do you know what BellSouth's share of that would be?

10 A. No, I do not. What I could assume, and I do not think
11 I would be far off in making this assumption, is that
12 it would be its adequate share based on the size of the
13 BellSouth region.

14 Q. And do you know what - what is the source of this
15 information, Mr. Hendrix?

16 A. I believe it was - I'm trying to think of the source,
17 and I may have that. The source was a study that was
18 done by - I don't know. It may have been USTA. I
19 can't remember exactly now. I may have it, and I could
20 give you the source later, but it was an industry type
21 effort of local companies.

22 MR. KRAMER:

23 Madam Chairman, we've not had an opportunity to
24 see this data before we received Mr. Hendrix'
25 rebuttal testimony. So I recognize that it's

1 unusual, but I would like to go through some
2 questioning of him on the data and stuff, because
3 there was no opportunity for discovery on this.
4 I'm sorry. I hope you'll indulge me on this.

5 Q. Can you supply a copy of the study for the record, Mr.
6 Hendrix?

7 A. Yes, I would be happy to provide whatever source info I
8 have on this.

9 Q. All right. Well, let's go through this. Do you know
10 what "by 2002" means? I mean, was that by the end of
11 the year, by the beginning of the year; do you know?

12 A. I would, and I'm only guessing, but the study will
13 validate either I'm wrong or right, I would think that
14 it would be by the start of the year. Usually that
15 would indicate through 2001, but I may well be wrong.

16 Q. Mr. Hendrix, are you familiar with DSL service?

17 A. DSL?

18 Q. Yes.

19 A. Yes, sir, I am.

20 Q. Digital subscriber loop?

21 A. Yes, I am.

22 Q. And isn't it true that DSL service is a broadband
23 access service to our Internet access that does not
24 involve reciprocal compensation?

25 A. Yes, it is. They use a different network.

1 Q. And isn't it . . .

2 A. The technology is different.

3 Q. Yes. Excuse me. Isn't it true that most of the major

4 BOCs, excuse me, Bell Operating Companies, and even

5 many CLECs are now doing major roll-outs of DSL

6 products?

7 A. I do not know about major CLECs. I know there are

8 quite a few in the BellSouth region that are, in fact,

9 using this product, and I do understand that many of

10 the ILECs are, in fact, rolling the product out.

11 Q. And that's true of BellSouth as well; isn't it?

12 A. We do, in fact, have some - we do have a roll-out

13 process; yes. That is correct.

14 Q. And doesn't the roll-out process consist of beginning

15 to market DSL through agents?

16 A. I'm not certain as to the market strategy, sir.

17 Q. Well, subject to check, would you agree with me that

18 one of the marketing agents for DSL is BellSouth.net?

19 A. It could be.

20 Q. And isn't it true, Mr. Hendrix, that, as DSL rolls out,

21 it will reduce the volume of circuit-switched Internet

22 traffic? It will draw traffic away?

23 A. No, I would not agree with that. I think, from what

24 I've seen, and I cannot quote the source at this time,

25 I think the penetration of Internet into households is

1 not at its peak, and I think you will still see growth
2 in that. I don't know whether that growth will stay at
3 the rapid rate, but I think it will definitely grow
4 some.

5 Q. Isn't it true that DSL products are being rolled out
6 for residential service?

7 A. Yes, it is.

8 Q. And isn't it true that some of the Internet access from
9 increased residential will be through DSL?

10 A. I believe it would be; yes.

11 Q. And it's also true that cable modem is rolling out in a
12 major way for Internet access; isn't it?

13 A. That is my understanding; yes, sir.

14 Q. And other broadband services?

15 A. Yes, sir, I do understand that.

16 Q. Do you know if the study that you're citing here took
17 account of any of these developments and of the trends
18 predicted for these other competitors for circuit-
19 switched access?

20 A. It has been awhile since I've looked at the study. It
21 may. I do not know, and I think, once we get a full
22 copy of the study and evaluate it, we can answer those
23 questions, but I'm just not certain, because it has
24 been awhile.

25 Q. Mr. Hendrix, on Page 6 of this, you give some data, and

1 you particularly give some figures regarding the
2 exchanges of reciprocal compensation based on
3 reciprocal compensation billings for ISPs; is that
4 right?
5 A. Yes, sir, I do.
6 Q. By the way, has BellSouth paid any of this?
7 A. For ISP traffic?
8 Q. Yes.
9 A. We have not knowingly paid for any . . .
10 Q. You have not knowingly. So none of this money is . . .
11 A. . . . but, in this state, no, I don't believe we have.
12 Q. So none of this is any money you've spent so far?
13 A. We have not knowingly paid for any.
14 Q. Have not knowingly paid. So we're looking at this
15 number now, and, Mr. Hendrix, are you saying to this
16 Commission that, based on this number alone and without
17 taking a look at BellSouth.net and all the revenue from
18 second lines and the DSL roll-out and all the other
19 increased revenues that BellSouth is realizing as a
20 result of Internet access, are you saying that this
21 Commission should look at this number alone and base
22 any kind of a determination on it?
23 A. Well, I think you made some very broad assumptions that
24 are totally inappropriate, and they're not right. You
25 assume that every market is growing and that . . .

- 1 Q. Excuse me, Mr. Hendrix. If you could, just answer yes
2 or no and then you can explain.
- 3 A. Okay. I am stating, based on this and based on their
4 knowledge of what ISP traffic is, yes, that we should
5 not compensate you for this traffic, but many of the
6 assumptions you use as a preface for the question are
7 totally inappropriate, and they're not right. The
8 first assumption is to assume that every market is
9 growing and revenues are growing in every market, and I
10 don't know that that is the case, but, clearly, here,
11 we're talking ISP-bound traffic. ISP-bound traffic,
12 while it has been made perfectly clear that it's
13 nonlocal interstate traffic, for us to be asked to
14 compensate any CLEC for this traffic is totally
15 inappropriate.
- 16 Q. But all of - excuse me. I'm sorry.
- 17 A. And, based on this data and not only on this data but
18 everything else that has been filed in this case and
19 what's in the various Orders, I am asking that they not
20 compensate or not require us to compensate for nonlocal
21 traffic through the agreement process. It's not
22 appropriate.
- 23 Q. But BellSouth is not putting on the table, regarding
24 the impact of ISP traffic on it, any of the other
25 revenues I referred to, the second line revenues,

1 BellSouth.net revenues? You don't regard any of that
2 as relevant to this Commission's look at whether or not
3 there should be compensation?
4 A. Definitely not.
5 Q. Okay.
6 A. This is the issue, and we're simply addressing this
7 issue, and this issue is whether we should pay for
8 nonlocal traffic, and the facts in the Order will speak
9 for themselves that it's not traffic that we should be
10 compensating any CLEC for as local.
11 Q. Mr. Hendrix, have you reviewed Mr. Starkey's direct
12 testimony?
13 A. Yes, sir, I have.
14 Q. Does it occur to you that the chart and this imbalance
15 may reflect the fact that CLECs are able to track the
16 ISP market easier because it is a new and emerging
17 market?
18 A. No, I would not agree with that, and the reason I will
19 not agree with that I have a bit of history with ICG
20 that perhaps most people do not have since I sign all
21 of the agreements and I negotiated the first one. ICG
22 was very much interested in a bill-and-keep arrangement
23 and had it in their first agreement, and so I think
24 this process of asking us to pay for this traffic, in
25 all honesty, my personal opinion is a process of gaming

1 which simply is not right. It's not fair. It's not
2 right. So that's what I believe is actually happening.
3 Q. Okay. Mr. Hendrix, if I could ask you - do you have a
4 copy of Mr. Starkey's direct testimony with you?
5 A. Yes, sir, I do.
6 Q. May I ask you to get it out? Thank you.
7 A. Yes, sir, I have it.
8 Q. Mr. Hendrix, could I ask you, please, to turn to Mr.
9 Starkey's Diagram 3?
10 MR. HATFIELD:
11 I think you're going to need the direct.
12 MR. KRAMER:
13 I think it's the rebuttal; isn't it?
14 MR. HATFIELD:
15 Diagram . . .
16 A. There is a Diagram 3 on . . .
17 CHAIRWOMAN HELTON:
18 There's a Diagram 3.
19 MR. KRAMER:
20 Yeah. I'm sorry. It is in the direct. Thank
21 you.
22 MS. FOSHEE:
23 It's Exhibit No. 4 to his testimony.
24 MR. KRAMER:
25 It's MS-4; yeah.

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CHAIRWOMAN HELTON:

Uh-huh.

A. Yes, sir, I am there.

Q. Mr. Hendrix, this is a conceptual drawing of ICG's network, and I would like to ask you a few questions. If ICG wanted to buy facilities to move traffic between its collocation at ILEC Central Office B and its collocation at ILEC Central Office D and it went to buy the facilities to move that traffic from BellSouth, wouldn't ICG buy transport from BellSouth?

A. They would purchase - well, they would purchase some form of transport, . . .

Q. Right.

A. . . . either a local channel or an interoffice.

Q. Transport?

A. That's correct.

Q. And, similarly, if ICG was buying the facilities to move traffic from, say, ILEC Central Office B to the ICG switch at the bottom of the chart or from any one of the central offices around that ring, that would be a purchase of transport from BellSouth; is that correct?

A. Probably. It doesn't have to be from BellSouth.

Q. Right. No. If they bought it from BellSouth, they would . . .

1 A. If they purchase it from BellSouth. I would hope they
2 would be purchasing it from BellSouth.
3 Q. All right. Mr. Hendrix, were you here when Mr.
4 Holdridge testified this morning?
5 A. Probably at least for some parts of it.
6 Q. All right. I would like to ask you some questions in
7 connection with your interpretation of EEL which is
8 discussed on Page 41 of your rebuttal testimony, and I
9 would like to have you . . .
10 A. Are we finished with this testimony?
11 Q. We're finished with this diagram; yes.
12 A. Yes, sir.
13 Q. We are.
14 MS. FOSHEE:
15 Page what of his rebuttal? I'm sorry.
16 MR. KRAMER:
17 Page 41. I'm sorry.
18 A. Yes, sir, I'm here.
19 Q. All right.
20 MR. KRAMER:
21 Madam Chairman, may I, again, approach the witness
22 just to hand out a diagram?
23 CHAIRWOMAN HELTON:
24 Yes.
25

1 MR. KRAMER:

2 Madam Chairman, may I have this marked as Cross
3 Exhibit 2?

4 CHAIRWOMAN HELTON:

5 Okay.

6 HENDRIX CROSS EXHIBIT 2

7 Q. Mr. Hendrix, would you agree with me that the segment
8 from H to G on this diagram is a loop?

9 A. It's part of a loop, yes, and I'm not trying to be a
10 smart aleck, . . .

11 Q. No. I understand.

12 A. . . . but I'm assuming it would go into the CO and
13 terminate somewhere on the switch and that piece is not
14 shown here.

15 Q. It's not shown here; that's right. It would go into
16 the CO, and it would terminate on a frame and then on a
17 switch?

18 A. Yes, sir.

19 Q. And just recognizing in the diagram that we would then
20 have a cross-connect at the Point F, transport between
21 F and E, and then we would have it coming into a
22 BellSouth Central Office which, on this diagram, is
23 BellSouth Central Office 2.

24 A. Yes, sir, I see that.

25 Q. Now, focusing on the segment that would be from H

1 through G, F, E, C, and D, so that we basically had a
2 loop and a transport that was terminated in an ICG
3 collocation . . . - are you able to follow me?

4 A. Yes, I am.

5 Q. . . . that was terminated in an ICG collocation and
6 that ICG was purchasing this as a special access
7 circuit from BellSouth, . . .

8 A. Yes, sir, I follow you.

9 Q. . . . under the FCC's recently released UNE remand
10 Order, could ICG convert that facility to a UNE
11 combination?

12 A. Well, once the Order is effective. To my knowledge,
13 the Order has not been published in the register yet,
14 and then you would have 30 days from that date to have
15 an effective Order and, at the same time, I believe you
16 would have rules that would actually follow. My
17 understanding is that that would be an arrangement that
18 is existing with an ICG customer that you've currently
19 purchased under the special access tariff and that
20 would likely qualify for a switch as is in that case.

21 Q. So your testimony on Page 41, you're changing your
22 testimony on Page 41 by saying it would qualify
23 whereas, in your testimony on Page 41 in Lines 8 to 14,
24 you, in essence, say that it's unclear whether it would
25 constitute currently combined UNEs?

1 A. Well, no, I think what you heard me say just now is
2 that it would likely. I didn't say that it would, and
3 the word "likely" was used because it is unclear as to
4 what the Order means, the 319 remand, what it actually
5 means relatively to currently combined and that's why I
6 used the word "likely," because we are still trying to
7 understand the Order as to what it means.

8 Q. Well, Mr. Hendrix, if ICG comes to you the day after
9 the Order takes effect and says, "We would like to
10 convert this facility to UNEs," will you be ready with
11 an answer then?

12 A. We likely will, and I'm not hedging the answer. You
13 know, we thought we had a final Order. I believe that
14 was issued on November 4 and that it would be published
15 in the Register soon. Well, we just got another Order
16 dated November 24 to supplement that Order. We are
17 likely to get another Order, and what I'm saying is
18 that, if, in fact, we have an Order that is an
19 effective Order, we're going to abide by that effective
20 Order. Granted, we will likely appeal, and we will do
21 some other things, but it's unclear and I'm not certain
22 that the FCC is clear as to what they want to do
23 because the supplemental Order raises many other
24 questions . . .

25 Q. Mr. . . .

1 A. . . . and that was the reason for my answer. I wasn't
2 trying to hedge the answer.
3 Q. No. Mr. Hendrix, were you here this morning when Mr.
4 Holdridge testified as to this earlier?
5 A. Yes, and I think I . . .
6 Q. This was why I asked you. Did you hear Mr. Holdridge
7 say that it is ICG's position that they're going to use
8 the arrangements like the one that appear on what has
9 been marked as Cross Exhibit 2 to provide solely local
10 exchange service?
11 A. Yes, and I believe that was a change from what he had
12 previously offered. I mean, that's all well and good
13 to say that. I'm not certain what that buys. It's
14 like putting a fox in charge of a henhouse . . .
15 Q. I'm sorry?
16 A. . . . and asking us to trust him.
17 Q. I didn't hear what you said.
18 A. Well, I'm sorry. I'm saying I understand that he said
19 that, but I'm not certain what that buys. It's like
20 putting a fox in charge of a henhouse, with all the
21 problems we've had with usage and jurisdictional usage
22 with customers wanting us to bill them appropriate
23 usage. I understand that he says that, but, you know,
24 he just said that, but it's different from what he
25 filed.

- 1 Q. Well, so you don't think that's a real commitment; is
2 that what I'm hearing you say?
- 3 A. No, I'm not going to go that far. It's just that I'm
4 uncertain as to what he meant. I mean, I understand
5 him saying that he will use it strictly for local, and
6 it will not be used for special access. I mean, that's
7 okay but it's different from what was filed.
- 8 Q. Well, I understand but he changed what was filed.
- 9 A. Yes, sir, I understand that.
- 10 Q. So now we know that ICG's policy is that it will use
11 this only for local exchange service, and my question
12 is does that at all affect your answer?
- 13 A. No, it does not. My answer is to clarity of the Order
14 and whether or not, before the Order that was issued on
15 November 4 and then the follow-up Order, supplemental
16 Order on the 24th - I believe those are the dates -
17 whether or not they will be supplemented again. So
18 there's just some unclear things that we would have to
19 do, but, once the Order is effective, we will abide by
20 that Order, and we will make a choice as to what it is
21 that we think the Order obligates us to actually do,
22 but I cannot sit here and tell you now, with clarity,
23 that that's what we will do, because I do not
24 understand the Order totally.
- 25 Q. And so you're saying - Mr. Hendrix, I'll tell you, I'm

1 really taken back by this. So you're saying it is
2 BellSouth's policy that, even where you have a clear
3 commitment that an existing special access circuit will
4 not be used for local exchange service, you won't -
5 once the FCC's Order is effective, you're still not
6 clear whether you're going to convert that to UNES?
7 A. No, sir, that's not what I'm saying. I'm saying, as I
8 stated at Page 41, I believe, starting at Line 8,
9 BellSouth is determining exactly what the Order
10 obligates us to, and, if we are required to convert
11 those circuits that are currently special access
12 terminating into a collocation space that has the loop
13 and the transport elements as the two elements and if
14 we're obligated to do so, then we're going to abide by
15 the Order, and we're going to do it. With the
16 supplemental Order that has come out, it did not add
17 clarity.
18 Q. But the . . .
19 A. It actually . . .
20 Q. Excuse me.
21 A. I'm sorry. It actually made it more unclear, but we
22 will abide by the Order, and we will do whatever we
23 have to do to be in compliance with that Order.
24 Q. But wasn't the supplemental Order designed to make it
25 clear that the FCC was cutting back on the ability to

1 use existing combinations for exchange access, and
2 hasn't ICG renounced its use of this facility for an
3 exchange access? Isn't it true that's what the
4 supplemental Order did?

5 A. That's what it attempted to do; yes. I would agree
6 with that, and I understand that ICG has offered not to
7 use EELs for anything other than true local traffic.

8 Q. Well, just so the record is clear, let me just go to
9 the next hypothetical, although I think I know the
10 answer. Let's assume that there is an existing
11 facility, an existing customer of BellSouth's on the
12 facility between H, G, F, E, C, A, B so that we have a
13 termination into the BellSouth switch in BST Central
14 Office 2 where ICG is also collocated. Okay?

15 A. Yes, sir.

16 Q. And let's assume that the service that BellSouth is
17 offering here is the use of this facility to provide
18 the ANSA service, in other words, to provide ISDN
19 support for the customer premises here, H, out of a
20 central office where the end office doesn't serve the
21 customer and that's the service Mr. Holdridge referred
22 to this morning when he said BellSouth uses EELs; do
23 you recall that?

24 A. No, I do not.

25 Q. Well, then assume with me, if you will, you're familiar

1 with ANSAs or with providing ISDN support from . . .

2 A. Yes, I am.

3 Q. Okay. So just assume with me that's what this facility

4 is doing, and now assume with me that that same

5 BellSouth customer says to BellSouth that it wants to

6 change to ICG and would BellSouth simply take the

7 cross-connect, which is the link shown here that would

8 be A, B, and cut off the tail between C and A, and move

9 the cross-connect so that it terminates in the ICG

10 collo at D. So, in essence, we would cut off the C, A,

11 B function link, and the cross-connect would just be

12 moved over to the ICG collo. Would you regard that as

13 an existing facility?

14 A. Do you mean as a switch as is or currently combined?

15 Q. Yes, as a switch as is.

16 A. No, I would not because, while the Order is unclear,

17 what I understand "currently combined" to mean is that

18 BellSouth would have to have an end user that's

19 purchasing a special access terminating in an ICG

20 collocation space, and, to my knowledge, we do not have

21 that.

22 Q. You mean in the hypothetical I just gave?

23 A. That's correct.

24 Q. Yeah. So you would regard, though, even though the

25 combined loop and transport, what ICG is calling the

1 EEL, is coming to the same central office, and all ICG
2 is asking you to do is to move a cross-connect from the
3 BellSouth switching to the ICG collo, you would not
4 regard the combined transport and loop in that
5 situation as an existing facility?

6 A. No, it does not exist because that customer is a
7 BellSouth end-user customer, and we do not have an
8 arrangement for a BellSouth end-user customer that's
9 purchasing special access to terminate into an ICG
10 collocation arrangement.

11 Q. Mr. Hendrix, wouldn't your position have the effect of
12 preventing ICG from competing on an efficient basis for
13 that customer?

14 A. No, sir, I don't believe it will; no.

15 Q. Okay. Now, just one last question on the diagram or
16 it's actually something you referred to - well, let me
17 ask you, Mr. Hendrix, do you happen to have the FCC's
18 UNE remand Order with you?

19 A. No, sir. I have the supplemental. I did not bring the
20 larger Order.

21 MR. KRAMER:

22 Madam Chairman, may I approach the witness?

23 CHAIRWOMAN HELTON:

24 Yes. Are you finished with this Exhibit that we
25 marked?

1 MR. KRAMER:

2 Yes.

3 CHAIRWOMAN HELTON:

4 Do you want to move it into the record?

5 MR. KRAMER:

6 Yes, please, I would like to move it into the
7 record.

8 CHAIRWOMAN HELTON:

9 So ordered.

10 MR. KRAMER:

11 Thank you, Madam Chairman.

12 HENDRIX CROSS EXHIBIT 2

13 CHAIRWOMAN HELTON:

14 Mr. Kramer, do you have much more for this
15 witness?

16 MR. KRAMER:

17 I would say 15-20 minutes.

18 CHAIRWOMAN HELTON:

19 Okay. I believe we need to take a break. We'll
20 take a 15 minute break.

21 MR. KRAMER:

22 All right. Thank you, Madam Chairman.

23 OFF THE RECORD

24 CHAIRWOMAN HELTON:

25 Mr. Kramer?

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MR. KRAMER:

Thank you, Madam Chairman.

Q. Mr. Hendrix, could we just go back to Cross Exhibit No. 2, this diagram, for just one or two quick questions? Will you agree with me that the transport terminates at an entrant's facility at the letter E as in Edward?

A. No, sir, I would not.

Q. Where would it terminate?

A. The transport, in this case, that is an inner office transport because it's going between Central Office 1 and Central Office 2 prior to going into the collocation space. It's probably on a DSX type panel or something of that nature.

Q. Or DACS, something of that sort?

A. Yes, sir.

Q. And that would be, let's say, at C, something of that sort?

A. Around C, yes, somewhere in that area.

Q. Somewhere just inside the central office?

A. Yes, I would agree.

Q. Okay. Thank you.

MR. KRAMER:

Madam Chairman, you had just allowed me to approach the witness.

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CHAIRWOMAN HELTON:

Yes. Yes. Okay.

MR. KRAMER:

Thank you.

Q. Mr. Hendrix, I'm showing you Section 319(a)(1) and that is the definition of local loop. Could you just read the first sentence of the definition?

A. Yes, sir. "The local loop network element is defined as a transmission facility between a distribution frame ... in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC."

Q. Mr. Hendrix, subject to check, would you agree with me that the definition of loop that you just read is similar to the definition of loop that's contained in the current interconnection agreement that ICG and BellSouth are negotiating?

A. Subject to check. I mean, there are various loops, but, subject to check, yes, sir.

Q. Yeah. But isn't this the general definition of a loop or it looked like the general definition of a loop contained in your template?

A. Yes, I would agree.

Q. Yeah.

A. Yes, I would agree.

- 1 Q. Okay. Mr. Hendrix, could I ask you to look at Pages 34
2 and 35 of your direct testimony?
- 3 A. Yes, sir, I'm here.
- 4 Q. Several places in this area, for example on Line 20 of
5 Page 34, you refer to ISPs as carriers, again, in the
6 "Q," beginning on Line 7 of Page 35, and carrying over
7 into the answer, "Why is the fact that ISPs are
8 carriers . . ." in the "Q" and then "The fact that ISPs
9 are carriers . . ." in the first line of the answer.
10 Can you tell me where the FCC has ever said that ISPs
11 are carriers?
- 12 A. I believe there are references dating back to the '83
13 Order where the FCC mentioned that ISPs, which they are
14 a subset of ESPs, like carriers, provide interstate
15 services, and I think it's from those inferences. I
16 can't remember right offhand if the word "carrier" is
17 actually used, but it was in the carrier context.
- 18 Q. But you say it's important to your analysis that they
19 are carriers?
- 20 A. Yes, sir, because they are, in fact, providing access
21 services but they are allowed to not be assessed access
22 charges for a period of time which access charges are,
23 in fact, assessed to carriers, and the FCC has exempted
24 them from this access charges for this interim period.
- 25 Q. It's true that the FCC has exempted them from access,

1 but can you cite me anywhere where the FCC has actually
2 said they're carriers?
3 A. I cannot readily put my hand on it; no, sir.
4 Q. Isn't it true that enhanced service providers, of which
5 ISPs are one class, are not regulated like carriers?
6 A. I would agree that they are not at this moment because
7 the point that I just made as to the fact that they do
8 not pay access charges would indicate there that they
9 are, in fact, not regulated like carriers, but they do,
10 in fact, provide access services through the ISP type
11 offerings that they have, but they are exempt from
12 access charges.
13 Q. But, Mr. Hendrix, if you say it's important that they
14 are carriers, surely you must have some authority for
15 the proposition that they are carriers.
16 A. And I do not have anything here that I could readily go
17 back in and reference; I'm sorry.
18 Q. You would agree with me they're enhanced service
19 providers?
20 A. Oh, yes, sir, I would agree with that; right.
21 Q. And you would agree that enhanced service providers are
22 not regulated like carriers?
23 A. I would agree with that; yes, sir.
24 Q. Mr. Hendrix, I want to just turn to one last portion of
25 your testimony, which I can't seem to locate. I know

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it's here. Mr. Hendrix, it's your position that, in order to qualify for the tandem rate on reciprocal compensation, ICG must not only serve a geographic area comparable to that of the BellSouth tandem but must also provide functionality similar to the BellSouth tandem; isn't that right?

A. Yes, sir, it is.

MR. KRAMER:

Madam Chairman, may I approach the witness for what I hope will be the last time?

CHAIRWOMAN HELTON:

Yes.

HENDRIX CROSS EXHIBIT 3

Q. Mr. Hendrix, I have handed you Section 51.711 of the FCC's rules. Can I ask you to read Subsection (a)(3)?

A. Yes, "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem inter-connection rate."

Q. Mr. Hendrix, is there any mention in there of comparable functionality?

A. There is not a mention there, but I think, to get the gist of what is being stated there, in the First Report

1 and Order, I believe it's Paragraph 1090, it speaks to
2 the application of the rates, are the words that are
3 stated here, and, to paraphrase those, what it states
4 is that a tandem switch will provide trunk-to-trunk -
5 three functions, I believe it is. There's trunk-to-
6 trunk, trunk-to-line, as well as serve the same
7 geographic area, and I believe you will find that in
8 Paragraph 1090 of the First Report and Order. Also, I
9 believe, in the 319(c)(2), it states the functions that
10 a local tandem switch is to actually offer or provide.
11 So I think it's very clear in those two cites as to
12 what is meant here by 51.711.

13 Q. But you would agree with me there's no mention of it in
14 the FCC's rule?

15 A. There's no mention of it here, but it is in the
16 319(c)(2) and Paragraph 1090 of the First
17 Report . . .

18 Q. But 319 - excuse me.

19 A. . . . and Order, but there is no mention here.

20 Q. And 319(c)(2), of course, doesn't speak to reciprocal
21 compensation. It only speaks to tandem functions;
22 isn't that correct?

23 A. I would have to go back and look, but I know that it
24 defines the functions, definitely.

25 Q. Defines the tandem functions?

1 A. Definitely, yes.

2 Q. But it doesn't speak to reciprocal compensation?

3 A. It may not. I would have to go back and check.

4 MR. KRAMER:

5 Madam Chairman, I have just one more housekeeping
6 matter. I referred several times to ANSA, and I
7 realize I may not have described that acronym.
8 Just for the record, it is alternate network
9 serving arrangement, ANSA, and I would like to
10 submit as a Cross Exhibit, because we did refer to
11 it, the page from the BellSouth tariff where that
12 is referenced. It's Tariff 2A, Third Revised Page
13 25.

14 CHAIRWOMAN HELTON:

15 So ordered.

16 HENDRIX CROSS EXHIBIT 5

17 MR. KRAMER:

18 And, Madam Chairman, I think we need to mark the
19 rule that I handed him as an Exhibit also, and I
20 would move its admission.

21 CHAIRWOMAN HELTON:

22 So ordered.

23 HENDRIX CROSS EXHIBIT 3

24 MR. KRAMER:

25 And I have nothing further at this time.

1 CHAIRWOMAN HELTON:

2 Ms. Dougherty?

3 MS. DOUGHERTY:

4 No questions.

5 CHAIRWOMAN HELTON:

6 Redirect?

7 MS. FOSHEE:

8 Three quick redirect questions.

9

10 REDIRECT EXAMINATION

11 BY MS. FOSHEE:

12 Q. Mr. Hendrix, Mr. Kramer talked to you some about the
13 issue of ISPs as carriers. The FCC exempted ISPs from
14 paying access charges; correct?

15 A. That is correct.

16 Q. And, presumably, the only reason the FCC needed to
17 exempt them from paying access charges is because, as
18 carriers, they otherwise would pay access charges; do
19 you agree with that?

20 A. That's my understanding; that's correct.

21 Q. Okay. Then, back at the beginning of his cross
22 examination, Mr. Kramer talked to you about your
23 Diagrams B and F and whether reciprocal compensation
24 for ISP-bound traffic was appropriate. What does
25 BellSouth want this Commission to do with respect to

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delegate to the states the job of determining the reciprocal compensation rate under the Section 252 arbitrations?

A. No, I don't read it that way.

MR. KRAMER:

Madam Chairman, I had hoped it was the last time. May I approach the witness . . .

CHAIRWOMAN HELTON:

Yes.

MR. KRAMER:

. . . one more time?

HENDRIX CROSS EXHIBIT 4

MR. KRAMER:

For the record, I've handed Mr. Hendrix the FCC's Declaratory Ruling of February 26, 1999. It is in CC Docket No. 96-98. The document number is FCC 99-38.

Q. Mr. Hendrix, could I ask you to read the first sentence of Paragraph 30?

A. Paragraph 30?

Q. Yes.

A. "We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements

1 negotiated and arbitrated under sections 251 and 252 of
2 the Act."

3 Q. And could you just read the next sentence as well? I'm
4 sorry.

5 A. Yes. "Resolution of failures to reach agreement on
6 inter-carrier compensation for interstate ISP-bound
7 traffic then would occur through arbitrations conducted
8 by state commissions, which are appealable to federal
9 district courts."

10 MR. KRAMER:

11 Madam Chairman, I have nothing further.

12 CHAIRWOMAN HELTON:

13 Thank you.

14 MR. KRAMER:

15 May I, just as a housekeeping matter, mark this
16 and move it in?

17 CHAIRWOMAN HELTON:

18 So ordered.

19 MR. KRAMER:

20 There must be hundreds of these in your records by
21 now.

22 CHAIRWOMAN HELTON:

23 Yes. One on my desk.

24 HENDRIX CROSS EXHIBIT 4

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MR. KRAMER:

Madam Chairman, before we close, I do, again, want to apologize publicly to Mr. Hendrix for my repeated lapses here. I'm very, very sorry.

A. I honestly was not bothered by it. Thank you so much.

CHAIRWOMAN HELTON:

You will give our regards to Mr. Varner? I do believe that the parties' best and final offers are due 20 days after this hearing, which would be the 22nd. I would ask if the parties believe that they need to do briefs. If so, we will set a date when those briefs are due.

MR. KRAMER:

Madam Chairman, we would like to submit a brief.

MS. FOSHEE:

As would we.

MS. DOUGHERTY:

Simultaneous?

MS. FOSHEE:

I think simultaneous with one brief.

CHAIRWOMAN HELTON:

When will the transcript . . .

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REPORTER:

The 17th.

CHAIRWOMAN HELTON:

Since this is due in January and the transcript is
due on . . .

MR. KRAMER:

Madam Chairman, . . .

CHAIRWOMAN HELTON:

Yes.

MR. KRAMER:

. . . may we go off the record for a moment?

CHAIRWOMAN HELTON:

Yes.

OFF THE RECORD

MS. DOUGHERTY:

So is that, on January 14, are we getting the
briefs . . .

CHAIRWOMAN HELTON:

The briefs.

MS. DOUGHERTY:

. . . as well as the contract language as ordered
in the . . .

CHAIRWOMAN HELTON:

Yeah. The contract language is due . . .

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MS. DOUGHERTY:

It's supposed to be due 20 days - by Order, it's already set to be due 20 days from today, which makes it December 22.

CHAIRWOMAN HELTON:

He was only referring to the briefs.

MR. KRAMER:

I was only referring to the briefs . . .

MS. DOUGHERTY:

Okay.

MR. KRAMER:

. . . but it's fine with us if you want to push back the best and final and the other, too.

CHAIRWOMAN HELTON:

No.

MR. KRAMER:

Oh!

CHAIRWOMAN HELTON:

We would like the best and final as they were due. We will give you an extension for the holidays on the briefs, and they will be due January 14. Then our Order will be moved by exactly that many days.

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MS. DOUGHERTY:

From the 22nd to the 14th?

CHAIRWOMAN HELTON:

Yes.

MS. DOUGHERTY:

Okay.

CHAIRWOMAN HELTON:

Well, from the extension that we've given. It was due the 27th, and we've given them until the 14th, so whatever that date comes out - I don't have a February calendar here - is when our Order will be due on this. Are there any other matters to come before the Commission? Hearing none, we're adjourned.

MS. FOSHEE:

Thank you.

MR. HATFIELD:

Thank you.

OFF THE RECORD

MS. DOUGHERTY:

We understand that the transcript will be filed December 17, and the best and final offers, including contract language as described in the Commission's Procedural Order, are due December 22. The parties have agreed to furnish the late-

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filed material by that date as well. The briefs will be filed no later than January 14, 2000, and, by mutual consent, both parties have agreed that the Commission's statutory deadline is February 24, 2000.

MR. HATFIELD:

That's correct.

FURTHER THE WITNESSES SAITH NOT
HEARING ADJOURNED
OFF THE RECORD

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STATE OF KENTUCKY
COUNTY OF FRANKLIN

I, Connie Sewell, the undersigned Notary Public, in and for the State of Kentucky at Large, do hereby certify the foregoing transcript is a complete and accurate transcript, to the best of my ability, of the hearing taken down by me in this matter, as styled on the first page of this transcript; that said hearing was first taken down by me in shorthand and mechanically recorded and later transcribed under my supervision; that the witnesses were first duly sworn before testifying.

My commission will expire November 19, 2001.

Given under my hand at Frankfort, Kentucky, this the 17th day of December, 1999.

Connie Sewell

Connie Sewell, Notary Public
State of Kentucky at Large
1705 South Benson Road
Frankfort, Kentucky 40601
Phone: (502) 875-4272

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IN THE MATTER OF:

PETITION OF ICG TELECOM GROUP, INC.
FOR ARBITRATION OF AN INTERCONNECTION
AGREEMENT WITH BELLSOUTH TELECOM-
MUNICATIONS, INC. PURSUANT TO
SECTION 252(b) OF THE TELECOMMUNI-
CATIONS ACT OF 1996

CASE NO. 99-218

FILED
DEC 17 1999
PUBLIC SERVICE
COMMISSION

TRANSCRIPT OF EVIDENCE

DATE OF HEARING: December 2, 1999

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1 CHAIRWOMAN HELTON:

2 Good morning. We're here in the matter of a Petition
3 by ICG Telecom Group, Inc., for arbitration of an
4 interconnection agreement with BellSouth Tele-
5 communications, Inc., pursuant to Section 252(b) of the
6 Telecommunications Act of 1996, which is Case No.
7 99-218. Could we have the appearances of the parties,
8 please?

9 MR. HATFIELD:

10 Good morning, Dr. Helton and Commissioners. I'm Kent
11 Hatfield with the firm of Middleton & Reutlinger, 2500
12 Brown and Williamson Tower, Louisville, Kentucky. My
13 colleague, Hank Alford, is here with me, and lead
14 counsel today for ICG will be Al Kramer, sitting to my
15 right. He's with the firm of Dickstein, Shapiro, Morin
16 & Oshinsky in Washington, 2101 L Street NW, Washington,
17 D.C. 20037-1526, and his colleague, Jacob Farber, is
18 also appearing for ICG today.

19 MR. MERSHON:

20 Madam Chairman, members of the Commission, I'm
21 Creighton Mershon representing BellSouth and, along
22 with me, my colleagues, Lisa Foshee and Langley
23 Kitchings, and we're at 601 West Chestnut, Louisville,
24 Kentucky 40203.

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CHAIRWOMAN HELTON:

Staff?

MS. DOUGHERTY:

Amy Dougherty for the Commission and staff.

CHAIRWOMAN HELTON:

Is there anyone else? Before we begin testimony, is there any member of the public that would like to give comments this morning? Hearing none, we will proceed.

MR. KRAMER:

Madam Chairman, we have one preliminary matter. ICG has voluntarily withdrawn the issue of volume and term discounts. So that issue is now moved from the proceeding.

CHAIRWOMAN HELTON:

Thank you. Does that mean that we'll have any witnesses that will not be appearing or be stipulated?

MR. KRAMER:

It does not. Excuse me, Madam Chairman. There are some portions of the testimony that address this issue, but they're now moot.

CHAIRWOMAN HELTON:

Okay. Thank you. If you would like to call your first witness.

MR. KRAMER:

Yes. Thank you. ICG calls, as its first witness,

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Bruce Holdridge.

WITNESS SWORN

The witness, BRUCE HOLDRIDGE, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you please state your name and address for the record?

A. Yes. My name is Bruce Holdridge, and my address is 180 Grand Avenue, Suite 800, in Oakland, California.

Q. And could you please give your title and your job responsibilities?

A. Yes. My title is Vice President of Government Affairs, and my responsibilities include the overall administration of existing and new interconnection agreements with Bell companies and independent telephone companies.

Q. Mr. Holdridge, did you cause to be prepared and submitted in this matter the direct testimony of Bruce Holdridge consisting of 13 pages?

A. Yes, sir.

Q. And, Mr. Holdridge, did you prepare or cause to be prepared the rebuttal testimony of Bruce Holdridge in this matter consisting of nine pages and one Exhibit?

A. Yes, sir.

1 Q. Mr. Holdridge, do you have any corrections to either of
2 your testimonies at this time?

3 A. Yes, I have corrections in my direct and my rebuttal
4 testimony. The first correction is on Page 3, Line 15,
5 where it says that I have testified before the North
6 Carolina Utilities Commission. That should be the
7 Georgia Public Service Commission. On Page 6, I would
8 like to delete or strike my testimony from Lines 16
9 through 20 and that proceeds on to Page 7, Lines 1
10 through 8. I would like to amend my testimony on Page
11 9, Line 2. The word "can" should be "cannot," and I
12 would like to amend my testimony on Line 18 so that it
13 reads, "ICG intends to use the EEL only" - instead of
14 "primarily" - "for offering its customers local
15 exchange service." I would like to delete the
16 following sentence, and I would like to add to the end
17 of the first sentence that "ICG intends to use the EEL
18 only for offering its customers local exchange service
19 until the FCC has a rule in effect in its further ..."

20 Q. Mr. Holdridge, could you go a little more slowly,
21 please?

22 A. I'm sorry; uh-huh. ". . . until the FCC has a rule in
23 effect in its further proceeding in the UNE remand
24 proceeding." One last minor correction is on Page 11,
25 Line 13. The word "establish" should be past tense,

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"established."

Q. And in your rebuttal testimony?

A. Yes. In my rebuttal testimony on Page 5, I would like to delete the testimony between Lines 7 through 23.

Q. Mr. Holdridge, as so corrected, if I asked you each of the questions contained in your direct and rebuttal testimony, would your answers be the same?

A. Yes, sir.

MR. KRAMER:

Madam Chairman, at this time, the witness is tendered for cross, and I move the admission of Mr. Holdridge's testimony and the attached Exhibits.

CHAIRWOMAN HELTON:

So ordered. Ms. Foshee?

MS. FOSHEE:

Thank you.

CROSS EXAMINATION

BY MS. FOSHEE:

Q. Good morning, Mr. Holdridge.

A. Good morning, Ms. Foshee.

Q. I want to talk to you first a little bit about packet-switching. Now, in Georgia, you told the Commission that this issue was settled; correct?

A. Yes, ma'am.

1 Q. Okay. And, in Tennessee, you told the authority that
2 it was also settled; correct?
3 A. Yes, ma'am.
4 Q. And today I presume the issue is not settled; correct?
5 A. I don't believe that is correct. I believe that the
6 issue is settled.
7 Q. Okay.
8 MS. FOSHEE:
9 Is that an issue ICG wants to withdraw from this
10 proceeding?
11 MR. KRAMER:
12 No. We are not withdrawing the issue. We have
13 settled the issue. As Mr. Holdridge's rebuttal
14 testimony explains, we have accepted the pricing
15 proffered by BellSouth, and there is no longer any
16 issue in dispute, but we have not withdrawn the
17 issue.
18 Q. Mr. Holdridge, what is it that ICG wants this
19 Commission to decide with respect to packet-switching?
20 A. We would like to accept BellSouth's offer, and we would
21 like for the record to reflect that we have accepted
22 BellSouth's offer for their pricing as in Mr. Hendrix'
23 Exhibit.
24 Q. Okay. Thank you. We'll move on. Now, with respect to
25 the EEL, which I think is the second topic that you

1 discuss in your testimony, I think you'll agree with me
2 that the EEL is comprised of three elements: loop,
3 transport, and cross-connect.

4 MR. KRAMER:
5 Objection. As "elements" being used, it's a
6 technical phrase. It's a legal phrase.

7 MS. FOSHEE:
8 I asked the question how I asked it, Mr. Kramer.
9 I think the witness is entitled to answer.

10 CHAIRWOMAN HELTON:
11 Answer, please.

12 A. As I understand it, if the word "element" is being used
13 in a legal definition, there are two network elements
14 and that is a loop and a transport. We don't believe,
15 ICG does not take the position, that a cross-connect is
16 an element.

17 Q. Okay. Let me rephrase it. Can we agree that there are
18 three pieces to an EEL?

19 A. Yes, ma'am.

20 Q. Okay. And, to form the EEL, those three pieces need to
21 be combined; correct?

22 A. The loop must be tied together with the transport using
23 the cross-connect; yes.

24 Q. Okay. And I think that you understand that the FCC has
25 declined in its recent 319 Order to make the EEL a

1 separate UNE; correct?

2 A. No, I don't agree with that. I believe that the FCC
3 has clearly mandated that, where EELs or combined
4 facilities exist in the BellSouth network, that they
5 have mandated BellSouth make those existing facilities
6 available to CLECs such as ICG, and BellSouth has
7 combined facilities in their network. They use them
8 for ISDN services in an ANSA environment as described
9 in the general subscribers tariff in Kentucky, ANSA
10 standing for alternate network serving arrangement.
11 BellSouth uses them for foreign exchange type services.
12 BellSouth further uses them for private line services
13 for access to packet-switching services and may even
14 use them for off prem extension type applications to a
15 PBX service. So, no, I would not agree. I think that
16 existing facilities have been clearly mandated to be
17 made available to CLECs.

18 Q. Okay. Well, let me see if I can draw a distinction
19 here. Setting aside the currently combined issue,
20 which we'll get to in a minute, is it your position
21 that the EEL is on the FCC's list of UNES?

22 A. No. It is my position that the list is not exhaustive;
23 it's subject to change; and that the FCC has not yet
24 made a decision on the EEL as part of that list.

25 Q. Okay. Let's try it one more time. Is the EEL on the

- 1 FCC's current list of UNEs?
- 2 A. It is not on the current list of UNEs because it has
3 not been decided by the FCC.
- 4 Q. Okay. So, given that it's not on the current list of
5 UNEs, you're asking this Commission to do something
6 other than what the FCC has determined?
- 7 A. Well, no. We are asking right now that this Commission
8 mandate to ICG that they give us the existing
9 facilities, the existing combined network elements,
10 that BellSouth uses today in their network, subject to
11 further testimony by Ms. Schonhaut who can give you
12 legal opinions as to where ICG's position is on the
13 EEL, both for existing facilities as well as to be
14 decided by the FCC and new combined facilities. Ms.
15 Schonhaut can answer that question.
- 16 Q. Okay. Well, I don't want to put words in your mouth,
17 but it sounds to me like what you're saying, then, is
18 that all you're asking this Commission to do is to
19 order BellSouth essentially to do what the FCC has
20 ordered BellSouth to do.
- 21 A. Until the FCC rules further, that's correct.
- 22 Q. Okay. Now, in Georgia, I think you told me that the
23 ICG would use the EEL to provide special access;
24 correct?
- 25 A. That's correct.

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Q. Okay.

A. ICG has amended its position on that. ICG will not use special access via the EEL until the FCC has ruled further, and we will limit the application to local exchange service only.

Q. Okay. Can you agree with me, Mr. Holdridge, that BellSouth has no obligation to combine UNEs on behalf of CLECs?

A. No, absolutely not. I cannot agree with that. I do believe that BellSouth does have the obligation to combine facilities especially where they are existing, and I believe that that's clearly stated.

Q. Okay. I want to explore that view with you quickly through two hypotheticals. The first is let's assume that nowhere in BellSouth's network is a loop and a transport facility combined. In that scenario, ICG wants to order a loop/transport combination. Is it ICG's position that, in that case, BellSouth is obligated to provide ICG with a loop/transport combination?

MR. KRAMER:

Objection. Are you asking for a legal conclusion when you say "obligated"?

MS. FOSHEE:

No.

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MR. KRAMER:

Okay.

A. Where existing facilities are currently combined, it is BellSouth's obligation to provide those facilities.

Q. Okay. Well, I'm not sure that answered my question.

A. Okay. I'm sorry.

Q. In this scenario, okay, and the scenario is that, assume that nowhere in BellSouth's network is a loop and a transport combined and ICG orders a loop/transport combination from BellSouth, is it ICG's position that, in that situation, BellSouth is obligated to provide ICG with that loop/transport combination?

A. I believe that your hypothetical is unrealistic. At the same time, I believe that it is subject to a further decision by the Commission if you're talking about no combinations existing today.

Q. Okay. Well, as unrealistic as it may be, and it may be, I still don't think you've answered the question. I'm trying to find out ICG's position as to whether BellSouth would have to provide a loop/transport combination to ICG in that hypothetical world.

A. In the hypothetical . . .

MR. KRAMER:

Asked and answered. Objection. It has been asked

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and answered.

CHAIRWOMAN HELTON:

She did ask the hypothetical, and I don't believe he answered, because she did say it was not available. So could you answer it in terms of if it were not available?

A. If it were not available anywhere in BellSouth's network, I believe that BellSouth should be required to give it to ICG.

Q. Okay. And, in the second hypothetical, let's assume BellSouth's existing network. There's a new customer who lives in a new subdivision and does not have existing BellSouth service. ICG wants to serve that customer with a loop/port combination. Is it ICG's position that, in that scenario, BellSouth is obligated to provide ICG with a loop/port combination?

A. I'm unsure of the hypothetical only because ICG would not require the port combination. We are a facilities-based provider, and we use our own switches. So the hypothetical doesn't apply to ICG in that we don't ask for the port.

Q. Okay. Just humor me and let's assume a situation where ICG is asking for a loop/port combination.

A. Okay. Could you restate the hypothetical? I'm sorry.

Q. Absolutely. Absolutely. A new customer lives in a new

1 subdivision. No existing BellSouth service to that
2 customer.

3 A. Right.

4 Q. ICG wants, in a hypothetical world, a loop/port
5 combination to serve that customer. Is it ICG's
6 position that BellSouth is obligated to provide ICG
7 with that loop/port combination?

8 A. Seeking clarification, . . .

9 Q. Yes, sir.

10 A. . . . I would assume that your hypothetical does not
11 have any existing facility in place.

12 Q. Correct. New customer, new subdivision.

13 A. Until the FCC rules further, I would say, yes, it is
14 ICG's position that it should be provided by BellSouth.

15 Q. Okay. Mr. Holdridge, can you agree with me that
16 BellSouth has no obligation to combine UNEs in the
17 parties' current agreement?

18 A. In the parties' current agreement, I can't agree with
19 that. However, I would like to add that BellSouth does
20 have that obligation in other interconnection
21 agreements. I believe that BellSouth offers that
22 obligation in an interconnection agreement with ITC
23 DeltaCom and with Intermedia. We're asking for the
24 same thing. I know that enhanced extended links are
25 also made available in other jurisdictions, such as in

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the State of California by Pacific Bell and in the State of Texas by Southwestern Bell.

Q. But, in your agreement, there's no obligation; correct?

A. In our current agreement, there is no current obligation; that's correct.

Q. Okay. Now, Mr. Holdridge, you make the argument in your testimony that - I think you argue that, without the EEL as a UNE, ICG is going to be forced to collocate in every BellSouth central office.

A. Yes, that's correct.

Q. Okay. You understand that the resale provisions of the Act are available to ICG to provide service in those situations; do you not?

A. I do understand that. However, I would like to add that - first of all, to directly answer your question, resale is not an economically viable opportunity for facilities-based carriers, such as ICG, and I say that because there is an extreme financial burden involved with it. There's also a great deal of administrative responsibility for it, and also, in a resale environment, customers are put through a great deal of stress, and what I mean is, when they have to convert the service off of the resale environment and onto the on-network facility, we actually have to take that customer out of service and that is disruptive to the

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customer and their business and is disruptive to ICG's business practice, and it's difficult.

Q. Okay. Well, let's go back a little bit. You can agree with me that resale was designed, at least in part, to allow new entrants to serve customers in situations in which it wouldn't be economically feasible to deploy facilities; correct?

A. I believe that that's what the FCC intended back in 1996 and that that was the intent. However, things have changed tremendously since then as very often resale-based facility providers are not given support money and private capital from Wall Street or private venture capitalists, and, although there may be many resellers out there in the market existing today, they may not be financially viable. They may not be making a profit and may be under a different existence than what ICG is and may be out there just to be acquired by other providers, and so they may have a different business plan. I also feel that the FCC wasn't taking into consideration in a resale environment that, in order to do collocation, you're using up central office floor space which is more and more becoming a very precious commodity, and, by using the EEL, you would not have to use that central office floor space, and it could be preserved for future collocation activity.

1 Q. Mr. Holdridge, is ICG making a profit today?

2 A. You know, I don't know.

3 MR. KRAMER:

4 Objection. There is a company witness who will be
5 prepared to address that issue.

6 MS. FOSHEE:

7 I think I'm entitled to ask him the question. He
8 answered he didn't know. That's fine.

9 A. Yeah. I don't know. The person who would be best to
10 answer that question would be the witness Ms.
11 Schonhaut.

12 Q. Okay. Mr. Holdridge, are you aware that there are
13 operational resellers running businesses in Kentucky
14 today?

15 A. I'm not aware of any, but I'm sure that there may be
16 some. I don't know about their financial viability or
17 what their business plan or strategy is, and it may
18 differ greatly from ICG's.

19 Q. Does ICG serve residential customers in Kentucky?

20 A. No, we do not currently serve residential customers in
21 Kentucky, but the EEL would certainly help us get
22 closer to serving that market, including small
23 businesses, businesses that have nine lines or less.
24 That would be a major use of the EEL.

25 Q. Do you have any specific business plans to serve

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residential customers in Kentucky?

MR. KRAMER:

Objection. Business plans are proprietary. If you want . . .

CHAIRWOMAN HELTON:

Mr. Kramer, we've had several questions about business plans in all of the arbitrations that we have had, and I would like for the witness to answer.

MR. KRAMER:

All right.

A. ICG would certainly like to serve all customers that want their service, including residence, small business, large business, ISPs, IXCs, etc., and ICG would be willing to further analyze the ability to serve the residential market, but we would need the EEL in order to do that. It would certainly make it a much more available opportunity to ICG. At the same time, we would still need to do some analysis on that market, but, without it, we certainly cannot get closer to serving the residential market if we are not provided the EEL.

Q. But the answer is, I assume, no. You don't have any business plans today to serve residential customers?

A. Well, I don't know. I believe that Ms. Schonhaut could

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answer the specifics to the business plan, and I will leave that to her to answer.

Q. Okay. Let's talk for a minute about performance penalties that you talk about in your testimony.

A. Okay.

Q. On Page 12 of your direct, Lines 13 and 14 - let me know when you get there.

A. Sure. Yes, ma'am.

Q. You state that, ". . . given BellSouth's behavior since the passage of the Act, the incentive of entering the long distance market has not been sufficiently strong for BellSouth to provide an adequate level of service to competitive carriers." Is that your testimony?

A. Yes, ma'am, that's correct; it is.

Q. Okay. Now, Mr. Holdridge, you didn't attach any performance data to your testimony to support this allegation; did you?

A. No, I have not. This issue will be considerably addressed by witness Rowling later in this proceeding.

Q. Okay. But you didn't attach any performance data?

A. No, ma'am, I did not.

Q. Okay. Are you familiar with the PMAP system, Mr. Holdridge?

A. I'm familiar with the acronym through previous proceedings, but I have not gone on to the BellSouth

1 web site and looked at that information. I believe Ms.
2 Rowling has.

3 Q. Okay. So you understand, though, that that's the web
4 site of the performance measurements analysis platform?
5 That's the web site on which BellSouth posts
6 performance data for carriers, such as ICG?

7 A. Yes, ma'am, I am aware of that.

8 Q. Okay. And you've never looked at that data for
9 Kentucky?

10 A. No, I have not. I know that we've had trouble
11 accessing that site as the password we were given by
12 BellSouth was inaccurate and wouldn't work, but, again,
13 the person who looked at that specifically was Ms.
14 Rowling.

15 Q. Okay. But despite this allegation in your testimony,
16 you weren't that person; correct?

17 A. I'm not that person what? I'm sorry; I don't
18 understand.

19 Q. Who looked at the data.

20 A. No, I did not look at the data; that's correct.

21 Q. Okay. Now, with respect to the performance measure-
22 ments that you address in your testimony, I just want
23 to make sure I have this right. In North Carolina, ICG
24 changed its proposal and, at the hearing, asked for a
25 generic docket on these issues; correct?

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MR. KRAMER:

Madam Chairman, if I might, Ms. Schonhaut who is in charge of all the regulatory responsibilities will be testifying and a lot of these questions it will just ease things if we just hold them until she's on the stand, and she'll be happy to answer all of them.

MS. FOSHEE:

Dr. Helton, with all due respect, this witness has testified about these things, and it's in his testimony, and I think I'm entitled to ask him the questions.

CHAIRWOMAN HELTON:

Did you participate in the North Carolina proceeding?

A. No, ma'am, I did not.

MS. FOSHEE:

Okay. I'll move on.

Q. Did you participate in the Alabama proceeding?

A. Yes, ma'am, I did.

Q. Okay. And, in that proceeding, ICG withdrew the issue of performance measurements and penalties from consideration; did it not?

A. I believe it did.

Q. Okay. Did you participate in the Florida proceeding?

1 A. I did.

2 Q. Okay. And, in that proceeding, the Florida Commission
3 threw the issue out on the grounds that it didn't have
4 authority to award penalties; correct?

5 A. You know, I don't know. This really is a question and
6 a subject matter that should be addressed by either Ms.
7 Schonhaut or Ms. Rowling. My testimony on performance
8 measures directly relates to my operational experience
9 as the Vice President and General Manager for the
10 Northern California Region, and I am aware as to what
11 happens to customers and what ICG suffers when
12 BellSouth does not meet performance measures and have
13 no remedies in order to enforce those and that is what
14 my testimony sponsors, and it's why we need these
15 performance measures. We've had numerous network
16 outages and problems with BellSouth throughout our six-
17 state serving area. I know we've had problems in
18 serving arrangements, delayed activities, problems in
19 Birmingham in the Buckhead tandem, and the customer
20 perceives that as being a problem of ICG when, in fact,
21 it's a problem caused by BellSouth, and it causes us
22 public harm, and it causes us financial impact without
23 BellSouth having any responsibility or any recuperation
24 to ICG, and so my testimony is to the operational side
25 of things.

1 Q. Well, I guess I'm confused, Mr. Holdridge, because you
2 gave the speech to the Commission about all of these
3 issues but yet you're not the person who has looked at
4 the performance data. You don't want to testify about
5 the performance measurements. So, you know, I think we
6 need to answer my questions, or we need to limit your
7 answers to what you contend is in your testimony; okay?

8 MR. KRAMER:

9 Madam Chairman, I didn't hear a question. It
10 seems to me as though, if the witness needs
11 disciplining, the request should be made to the
12 Chair to discipline the witness. It's not for Ms.
13 Foshee to lecture the witness.

14 MS. FOSHEE:

15 I'll move on with another question.

16 CHAIRWOMAN HELTON:

17 Thank you.

18 Q. You talk some about penalties in your testimony and the
19 need for penalties. Have you reviewed ICG's penalty
20 proposal in this matter?

21 A. Yes. ICG proposed to BellSouth, during our
22 negotiations, penalty measures in our performance
23 measures in that general negotiation, and we did ask
24 for liquidated damages in that. BellSouth denied that
25 and denied various other activity on performance

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measures and would not offer anything except under 271 application at the FCC.

Q. Okay. So I presume, given your testimony in here about the support that you give to performance penalties, that you are supporting, in fact, the proposal that ICG is making in this proceeding; correct?

A. That was our initial position in . . .

MR. KRAMER:

Objection. I'm sorry. When you say "You are supporting ICG's position," are you asking Mr. Holdridge personally or are you asking - I'm not sure I know what the question means.

Q. Mr. Holdridge, are the penalties that you say are necessary, in your testimony, the same penalties that ICG is proposing that this Commission adopt?

A. No. The testimony that I have here was related to our proposal in negotiations. For the actual penalties that ICG is proposing, Ms. Rowling and Ms. Schonhaut can specifically address the exact line item issues of those penalties.

Q. Okay. So the penalties that you're saying are necessary, in your testimony, are not the same ones that this Commission is being asked to adopt?

A. No. I disagree with you. They are the same ones under liquidated damages and general provisions of that

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course and remedy.

Q. Okay. Okay. Now, with respect to those "liquidated damages," did ICG do any cost study to support the amounts of those liquidated damages?

A. I don't know.

Q. Okay. And do you know if those liquidated damages amounts have any relationship to actual damages that ICG might suffer?

A. I'm sorry. Could you repeat the question?

Q. Absolutely. The liquidated damages provision in ICG's proposal, do you know if the amount of those liquidated damages have any relationship to any actual damage that ICG might suffer?

MR. KRAMER:

Madam Chairman, again, there is a performance measures witness. There is a subject matter expert who will be testifying on this issue. Ms. Foshee is aware of that. I'm not sure why she's hammering this witness and why we're going through that. There is a legal witness. There is a subject matter expert in this area. It would certainly facilitate things and contribute to a better, fuller record if the questions were asked of the witnesses who are the subject matter experts.

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CHAIRWOMAN HELTON:

Mr. Holdridge, when you testify to liquidated damages, you are testifying in a generic term?

A. Yes, ma'am.

CHAIRWOMAN HELTON:

I think that satisfies it.

MS. FOSHEE:

Okay.

CHAIRWOMAN HELTON:

Go on.

Q. Now, I think, in your testimony at Page 12, Line 19 - Page 12 of your direct, sir, . . .

A. Of my direct?

Q. Yes, sir.

A. Yes. Line 19?

Q. Yes, sir.

A. Yes.

Q. You state that, in a generic sense, liquidated damages are appropriate or liquidated damages and/or penalties are appropriate because they'll provide a incentive to BellSouth to perform; is that your testimony?

A. And it goes on to say ". . . its obligations in a satisfactory manner"; yes, ma'am.

Q. Okay. And that incentive is going to stem from the fact that BellSouth will be financially punished if it

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fails to perform in some way; correct?

MR. KRAMER:

Madam Chairman, I'm going to raise the same objection.

MS. FOSHEE:

Dr. Helton, I'm trying to abide by your ruling, but that is directly out of his testimony.

CHAIRWOMAN HELTON:

And we have read it, and you can ask him if that's what he said, but we have read the testimony. So that is what you said in your testimony; correct?

A. Yes, ma'am.

CHAIRWOMAN HELTON:

Okay. Now, what are you asking him?

MS. FOSHEE:

Ma'am, I was asking if, by "incentive," he understands that the incentive is going to stem from the fact that BellSouth will be financially punished if it fails to perform, if that's his meaning of incentive, if that's where the incentive is going to derive.

CHAIRWOMAN HELTON:

Would you answer the question, please?

A. Yes, that's correct.

Q. Okay. Thank you. Mr. Holdridge, one last question

1 before I confer with co-counsel. On Page 13 of your
2 direct, Lines 8 and 9, you mention BellSouth's Proposal
3 for Self-Effectuating Enforcement Measures.
4 A. You know, is it appropriate for me to step back to
5 answer that question and just say that I don't know? I
6 really feel that that is the more accurate answer for
7 me to say I don't know and that really Ms. Schonhaut
8 and Ms. Rowling can most directly answer that question.
9 CHAIRWOMAN HELTON:
10 The previous question about incentive?
11 A. Yes, ma'am.
12 Q. So you don't know what you meant when you put that in
13 your testimony?
14 A. That's correct.
15 Q. Okay. If you can look at Page 13 of your direct, Lines
16 8 and 9, I believe that's where you talk about
17 BellSouth's Proposal for Self-Effectuating Enforcement
18 Measures.
19 A. Yes.
20 Q. Okay. In what context did BellSouth make that proposal
21 to the FCC?
22 A. It was tied to their 271 application for long distance
23 authority in region, and I remember, during our
24 negotiations, that BellSouth would not grant any
25 performance measurements or any remedies without first

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receiving in-region long distance authority and that was the position that they've maintained throughout these proceedings in the various six states that we've been in, and there would be no further discussion by BellSouth on this issue nor any further negotiation.

MS. FOSHEE:

Dr. Helton, if I could have one minute to confer with co-counsel, I think I may be done.

CHAIRWOMAN HELTON:

Sure.

MS. FOSHEE:

Thank you. Thank you. We have no more cross examination.

CHAIRWOMAN HELTON:

Thank you. Ms. Dougherty?

MS. DOUGHERTY:

We have no questions.

CHAIRWOMAN HELTON:

Redirect?

MR. KRAMER:

Please.

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REDIRECT EXAMINATION

BY MR. KRAMER:

Q. Mr. Holdridge, I want to try to clarify some of your testimony. Do you recall that Ms. Foshee asked you whether we are asking the Commission to order BellSouth to provide combinations of facilities that are not currently combined?

A. Yes, I remember that.

Q. Do you recall that? Do you recall that you answered, "We are not asking them to do that"?

A. I believe so; yes.

Q. Okay. Now, Mr. Holdridge, isn't it accurate that there are going to be situations where ICG will, in fact, ask BellSouth to combine?

A. Yes, that is, in fact, the case.

Q. All right. Now, you also stated that - well, let me withdraw that question. Do you remember Ms. Foshee asked you about the withdrawal of the performance measures issue in Alabama?

A. Yes, sir, I recall.

Q. Are you aware of whether or not that was part of any kind of settlement of other issues with BellSouth?

A. Yes, I believe it was.

Q. Do you know?

A. Yes, it was.

1 MR. KRAMER:
2 Okay. I have nothing further.
3 CHAIRWOMAN HELTON:
4 Recross?
5 RECCROSS EXAMINATION
6 BY MS. FOSHEE:
7 Q. Mr. Holdridge, are you confident in your answer that
8 ICG withdrew its performance measures issue as part of
9 a settlement?
10 A. In Alabama?
11 Q. Yes, sir.
12 A. Yes, I am. I believe that there were negotiations
13 going on throughout North Carolina and Alabama.
14 MS. FOSHEE:
15 Okay. No further questions. Thank you.
16 CHAIRWOMAN HELTON:
17 You may be excused. Commissioner Holmes, do you
18 have questions.
19 VICE CHAIRMAN HOLMES:
20 No.
21 CHAIRWOMAN HELTON:
22 Commissioner Gillis? You may be excused.
23 A. Thank you.
24 CHAIRWOMAN HELTON:
25 Mr. Kramer, next witness?

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MR. KRAMER:

I'm sorry, Madam Chairman. Thank you. I'm sorry.
The next witness is Phil Jenkins.

WITNESS SWORN

CHAIRWOMAN HELTON:

Proceed.

The witness, PHILIP W. JENKINS, after having been
first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you please state your name and address for the
record?

A. My name is Philip W. Jenkins. My work address is 50
Glenlake Parkway, Suite 500, Atlanta, Georgia 30328.

Q. And could you just give your title with ICG and
describe your responsibilities?

A. My title is Senior Director of Engineering and
Operations for the Southeast Region, and my
responsibilities include the design and implementation
of ICG's networks in the Southeast Region of the
country.

Q. And, Mr. Jenkins, did you prepare or cause to be
prepared the direct testimony of Philip Jenkins in this
proceeding consisting of five pages?

A. I did.

1 Q. And did you prepare or cause to be prepared the
2 rebuttal testimony of Philip Jenkins consisting of
3 three pages?
4 A. Yes, I did.
5 Q. And, Mr. Jenkins, do you have any corrections to either
6 of your testimonies?
7 A. Yes, I do. On my direct testimony, I ask to strike
8 Lines 18 through 32 from the direct testimony.
9 Q. I'm sorry?
10 A. That can be found on Pages 4 and 5.
11 Q. Mr. Jenkins, just to clarify, you mean Lines 18 to 22
12 on Page 4 and Lines 1 to 32 on Page 5?
13 A. Correct.
14 Q. All right. As so corrected, if I asked you each of the
15 questions contained in your direct and rebuttal
16 testimony, would your answers be the same today as they
17 are in the prefiled testimony?
18 A. Yes, they would.
19 MR. KRAMER:
20 Madam Chairman, at this time, I move the admission
21 of Mr. Jenkins' testimony, and the witness is
22 tendered for cross.
23 VICE CHAIRMAN HOLMES:
24 So ordered. Ms. Foshee?
25

1 MS. FOSHEE:

2 Thank you.

3 CROSS EXAMINATION

4 BY MS. FOSHEE:

5 Q. Good morning, Mr. Jenkins.

6 A. Good morning, Ms. Foshee.

7 Q. Will you agree with me that there is no obligation in
8 Section 251 or 252 of the Act for BellSouth to provide
9 these binding forecasts to ICG?

10 A. Yes, I would agree that there is no obligation.
11 However, the purpose of the binding forecasts is to
12 ensure quality service to the end user. The entire
13 purpose of the 1996 Telecom Act is to foster
14 competition. An integral part of making that
15 competition happen is providing quality services. ICG
16 is asking for an Order to implement this. Even though
17 it may not be explicitly called for in the Act, we're
18 asking for this Commission to order that it be put in
19 place.

20 Q. Okay. And there's no obligation in the parties'
21 current agreement to provide binding forecasts;
22 correct?

23 A. Not to my knowledge; no.

24 Q. Okay. Now, as I understand your proposal, ICG would
25 commit to a certain number of trunks and, if the

1 traffic volume falls short of the forecast, ICG would
2 pay BellSouth what you call its full cost of the unused
3 trunks; correct?

4 MR. KRAMER:

5 Go ahead, Mr. . . .

6 A. The term would better be served by "rate," assuming
7 that BellSouth's rate for those trunks recuperates our
8 costs.

9 Q. Okay. So let's see. I think, in your testimony, you
10 refer to the full cost, and you would like to change
11 that to the rate for those trunks; is that correct? I
12 believe, if you would like to refer, it's on Page 2 of
13 your rebuttal testimony, Lines 15 and 16. It says,
14 ". . . ICG will pay BellSouth its full cost for the
15 unused trunks." Do we need to amend that?

16 A. We can call it "rates." Yes, I am in agreement with
17 that.

18 Q. That it should be rates as opposed to costs?

19 A. Yes.

20 Q. Okay. Let me give you a hypothetical real quick, Mr.
21 Jenkins. Let's say we have an ICG forecast, a forecast
22 for a trunk group in Frankfort, and ICG says that that
23 trunk group is going to be fully utilized in two years
24 and let's assume that it costs \$500 to build the trunk
25 group and then it costs \$250 a year to maintain the

1 trunk group. So, at the end of those two years, we're
2 at \$1,000. Are you with me?
3 A. Yes, I am.
4 Q. Okay. If, at the end of those two years, ICG does not
5 use the trunk group, will ICG write BellSouth a check
6 for \$1,000?
7 A. No. ICG's proposal follows in term with what we are
8 presently doing. Presently, ICG provides BellSouth
9 with quarterly forecasts. Every three months we come
10 out with a forecast that will reflect if we are going
11 to need additional trunks for many small users that we
12 may be anticipating coming on line or even if you're a
13 big user, such as a call center. ICG's proposal would
14 look out three months. We would be willing, in certain
15 cases, to offer up the binding forecast and, at that
16 point in time, we would pay BellSouth a monthly rate
17 for the trunks that are not in service. As those
18 trunks go into service, ICG would cease to pay for
19 them. The trunks presently for DEOTS, for direct end
20 office trunking systems, those trunks are BellSouth's
21 responsibility to provide us with that service.
22 BellSouth pays for those. All ICG is asking for is to
23 have the requisite capacity available, and we're
24 confident that our forecasts are correct, and
25 therefore, at that point in time, we would be willing

- 1 to pay for those trunks that are unused if our
2 forecasts fall short.
- 3 Q. Okay. So the answer to my question is, no, ICG would
4 not pay BellSouth that \$1,000 of cost? It would pay
5 BellSouth the rate for those trunks?
- 6 A. On a monthly rate, we would pay the - we would
7 compensate BellSouth on a monthly basis for those
8 trunks not used.
- 9 Q. Okay. And so what ICG is proposing is that BellSouth
10 will incur the costs of provisioning those trunks on
11 the front end and maintaining the trunks through the
12 life of the trunk and, at some point, if ICG doesn't
13 use those trunks, ICG will pay BellSouth a monthly rate
14 for those trunks; is that correct?
- 15 A. Yes. ICG would pay - let me clarify. ICG would pay
16 BellSouth for the trunks not used commencing on the due
17 date that ICG says that they're needed.
- 18 Q. Okay. But BellSouth will incur the costs of
19 provisioning those trunks on day one; correct?
- 20 A. Yes, but that's no different than BellSouth selling any
21 service.
- 22 Q. Okay. Now, with respect to the testimony that you just
23 withdrew, I assume the reason that you withdrew that
24 testimony is that it wasn't correct; true?
- 25 A. Let me go to the testimony.

1 Q. Sure. Page 4, Lines 18 through 22 and Page 5, Lines 1
2 through 32.

3 CHAIRWOMAN HELTON:
4 Thank you.

5 MR. KRAMER:
6 Could I have the question repeated, please?

7 CHAIRWOMAN HELTON:
8 Ms. Sewell?

9 MS. FOSHEE:
10 Actually, I could just ask the question again to
11 speed things along.

12 CHAIRWOMAN HELTON:
13 Okay.

14 A. Please.

15 Q. Mr. Holdridge, the reason that you withdrew that
16 testimony is that it's not true; isn't that correct?

17 A. Mr. . . .

18 MR. KRAMER:
19 I'm going to object. The testimony is withdrawn,
20 and we're asking questions about the testimony.

21 MS. FOSHEE:
22 I think that, you know, presumably, when the
23 witness signed and submitted this testimony, he
24 thought it was true. It's a statement against
25 interest, and I'm entitled to ask him about it.

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The panel has read the testimony, and I want it clear on the record as to why it has been withdrawn.

MR. KRAMER:

Well, I believe the witness has withdrawn the testimony and now beginning to cross him on the testimony is not proper. It's not in the record.

CHAIRWOMAN HELTON:

Mr. Kramer, we have read the testimony. It was just withdrawn this morning. We would like to hear his answer as to why it was withdrawn.

MR. KRAMER:

All right.

A. First of all, the name is Mr. Jenkins.

Q. Oh, I'm sorry, sir. I'm sorry. That's my fault.

A. To answer the question, I do not agree with the section on binding traffic forecasts. The reason that I don't agree is that it refers to the forecast provider and the forecast recipient negotiating further what they are going to do under these terms. ICG feels that we are beyond the negotiation point, and we're ready for an Order to make this happen. This is a take-or-pay arrangement. ICG is willing to assume the risk involved if we fall short of our forecast. BellSouth would be left whole. We would not be asking BellSouth

1 to take any risk. The benefit is entirely 100 percent
2 to the customer, to the end user.

3 Q. Okay. And I think that you answered my question, but,
4 just to confirm for the Commission, your statement on
5 Lines 20 and 21, where it says, ". . . in which
6 BellSouth has agreed to binding forecasts with a CLEC,"
7 that's the part that's not entirely accurate, and I
8 think that's evidenced by your answer, that what this
9 provision on the next page does is obligate the parties
10 to negotiate further; correct?

11 A. Correct.

12 Q. Okay.

13 A. The paragraphs that follow don't clearly show that
14 BellSouth has agreed to the binding forecasts.

15 Q. Great. Okay. Thank you.

16 MS. FOSHEE:
17 If I could just have one minute. No further
18 questions. Thank you.

19 CHAIRWOMAN HELTON:
20 Ms. Dougherty?

21 MS. DOUGHERTY:
22 No questions.

23 CHAIRWOMAN HELTON:
24 Thank you. Redirect?
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MR. KRAMER:

Yes, just briefly, I think.

REDIRECT EXAMINATION

BY MR. KRAMER:

Q. Mr. Jenkins, just to clarify a point Ms. Foshee made, if ICG gives BellSouth a forecast and says, "We want X number of trunks on January 1," assuming we're far enough ahead of the curve or the timeline, "and we're going to need those trunks from that date forward," and those trunks are not being used on January 1, would ICG commence to pay the rate for those trunks immediately on January 1?

A. Yes, they would.

Q. Would ICG delay, in any manner, until the end of some subsequent period beginning to make payment at the rate for those trunks? Would ICG delay payment?

A. No, we would not.

Q. Okay. Now, Mr. Jenkins, just to clarify, at the time when you - I'm not talking about the deleted testimony. Are you with me?

A. Okay.

Q. At the time when you inserted the deleted lines in your testimony, did you believe that those obligated BellSouth to provide binding forecasts?

A. That was my interpretation at the time.

1 Q. And was that interpretation subsequently clarified by
2 BellSouth? Did BellSouth clarify that it was not
3 intended to be a binding forecast provision for you?

4 A. In previous hearings, yes.

5 MR. KRAMER:

6 Okay. Thank you. Nothing further.

7 MS. FOSHEE:

8 No recross. Thank you.

9 CHAIRWOMAN HELTON:

10 Thank you. You may be dismissed. Mr. Kramer?

11 MR. KRAMER:

12 At this time, ICG calls Gwen Rowling.

13 WITNESS SWORN

14 The witness, GWEN ROWLING, after having been first
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KRAMER:

18 Q. Please state your name and address for the record.

19 A. Gwen Rowling. My address is 11902 Burnett Road,
20 Austin, Texas.

21 Q. And could you give your position and describe your
22 responsibilities with ICG?

23 A. I'm Vice President - State Government Affairs, and I'm
24 responsible for the state regulatory activities for
25 ICG.

1 Q. And, Ms. Rowling, did you prepare or cause to be
2 prepared the direct testimony of Gwen Rowling submitted
3 in this matter consisting of 18 pages and four
4 Exhibits?
5 A. I did.
6 Q. And did you prepare or cause to be prepared the
7 rebuttal testimony of Gwen Rowling consisting of nine
8 pages?
9 A. I did.
10 Q. Do you have any corrections or additions to the
11 testimony?
12 A. I do. In my direct testimony on Page 11, on Line 16,
13 it should read, "The annual cap for Tier 1 and Tier 2
14 is \$120 million." Then I would like to also move that
15 corrected sentence to Line 14 so that the first
16 complete sentence would read, "There are overall annual
17 caps on penalties payable by Southwestern Bell. The
18 annual cap for Tier 1 and Tier 2 is \$120 million." In
19 addition, on Line 14, I would like to strike the words
20 "In addition," and I would like to include the words
21 "Within the annual cap limits." So, if I might, let me
22 just kind of read that all over again. So, on Line 14,
23 it would begin, "Yes. There are overall annual caps on
24 penalties payable by Southwestern Bell. The annual cap
25 for Tier 1 and Tier 2 is \$120 million. Within the

1 annual cap limits, if Southwestern Bell pays \$3 million
2 to a single CLEC or \$10 million to all CLECs in any one
3 month, the ILEC has the opportunity to initiate a show
4 cause proceeding to demonstrate why it should not be
5 liable for payments exceeding the monthly benchmarks of
6 \$3 million for a single CLEC and/or \$10 million for all
7 CLECs."

8 Q. Do you have any additional corrections?

9 A. No, I do not.

10 Q. As so corrected, if I asked you each of the questions
11 contained in your direct and rebuttal testimonies,
12 would your answer today be the same?

13 A. Yes, it would.

14 MR. KRAMER:

15 Madam Chairman, at this time, I move the admission
16 of Ms. Rowling's testimony and Exhibits and tender
17 her for cross.

18 CHAIRWOMAN HELTON:

19 So ordered. Ms. Foshee?

20 CROSS EXAMINATION

21 BY MS. FOSHEE:

22 Q. Good morning, Ms. Rowling.

23 A. Good morning.

24 Q. How are you?

25 A. Just fine.

1 Q. Good. Can we agree that the issue here today is not
2 whether the parties will have performance measurements
3 but which performance measurements the parties will
4 have?
5 A. I think that we can be in agreement on the fact that
6 it's a question of whether or not we'll have a fully
7 articulated set of performance measurements that are
8 functional immediately or a set that BellSouth proposes
9 that are not fully articulated and therefore not
10 functional immediately as well as the issue has to be
11 also, tied to that, an enforcement mechanism plan
12 because, unless we tie the enforcement mechanisms,
13 self-effectuating enforcement mechanisms, then all we
14 have is data, data on a performance measurement, rather
15 than a self-effectuating enforcement mechanism that has
16 some teeth to the performance measures and that also
17 has the ability to ensure that BellSouth does
18 performance obligation under 251 and 252, and those, I
19 believe, are the issues.

20 MS. FOSHEE:

21 Madam Chair, if I could . . .

22 CHAIRWOMAN HELTON:

23 Ms. Rowling, I think you just summarized your
24 testimony. Could you please keep your answers
25 confined to what's asked?

1 A. Yes, ma'am.

2 Q. And ICG's proposal comes from Texas, does it not, not
3 from any state in BellSouth's region; correct?

4 A. That is correct.

5 Q. Thank you. Let's look at some of the measures that
6 you've proposed and some of BellSouth's measures. Do
7 you have your proposal before you?

8 A. Yes, I do.

9 Q. Okay. If we could look, first, at the Texas
10 measurement or ICG's measurement, which is average time
11 to return FOC. I think it's on Page 9 of your
12 measurements. Can you tell me what that measures?

13 A. If you look on that, you can see on the definition the
14 percent mechanized completions available within one
15 hour for EDI and LECs which are OSS systems.

16 Q. I'm sorry. Are you looking at average time to return
17 FOC?

18 A. I'm looking on Page 9.

19 Q. I'm sorry.

20 MR. KRAMER:
21 I'm sorry. Where are we? Yeah. Excuse me.

22 MS. FOSHEE:
23 It's Page 9 of my Exhibit, average time to return
24 FOC.
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MR. KRAMER:

Oh! Exhibit. You said Exhibit. I'm sorry.

MS. FOSHEE:

Yes, sir.

MR. KRAMER:

You said the testimony.

MS. FOSHEE:

Yes, sir.

MR. KRAMER:

That's what the confusion is.

MS. FOSHEE:

I hope we have the same pages.

VICE CHAIRMAN HOLMES:

You're on Page 9 of 141?

MS. FOSHEE:

Yes, sir.

A. I have the percent mechanized completions available within one hour for completion in SORD for Page 9.

Q. That's my Page 10. I'm sorry. We'll have to just kind of work around this, . . .

A. Okay.

Q. . . . but the measurement I'm looking for is average time to return FOC. It's probably one page over from where you were.

A. Okay.

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Q. Okay.

A. I've got it.

Q. Thanks. Can you tell the Commission what this measurement measures?

A. As it said in the definition, because each of the performance measures has a definition, the average time to return a firm order confirmation, which is when the ILEC says that they're going to install facilities, is from receipt of complete and accurate service request to the return of a confirmation to the CLEC.

Q. Okay. And I presume that ICG thinks this is an important measurement.

A. Yes, it is, and, if you notice, it is important because it's fully articulated in the Texas performance measurement.

Q. Okay. Ms. Rowling, have you ever looked at BellSouth's performance for ICG under its measurement of FOC timeliness in . . .

A. Yes.

Q. . . . BellSouth's SQMs on the web site?

A. Yes.

Q. When was the first time you looked at that?

A. Actually, because I'm not in Operations, the first time I looked at it or was able, I should say, to look at it, is just this past week. The reason is that, in

1 order to access the PMAP, you have to use a user ID
2 code as well as a password, and the user ID and pass
3 code that we were provided to look at the PMAP was
4 actually inaccurate. It would only allow us to go into
5 what's called "PON" report, purchase order number
6 reports, and not allow us to access the PMAP. I didn't
7 realize that because I kept on, when I used the user ID
8 code and password that was provided to us . . .

9 MS. FOSHEE:

10 Madam Chairman, again, I asked her when was the
11 last time she looked at the measurements.

12 CHAIRWOMAN HELTON:

13 But she's explaining when she looked at it and
14 that there was a delay because of an incorrect
15 password. She has the right to say that.

16 MS. FOSHEE:

17 Okay.

18 A. I didn't realize it was incorrect because, when I used
19 it, it would call up the PON reports, and then, when I
20 clicked on the PMAP site, I kept on getting a web site
21 that says, "PMAP site is temporarily unavailable due to
22 system maintenance. Please check later." So I kept on
23 thinking that, all right, it was doing service or doing
24 some update. It wasn't until some inquiries were
25 further made to our Account Manager at BellSouth that

1 we were told that we had to get - that he had not
2 provided us with the correct user ID and password in
3 order to access the PMAP which is the actual
4 performance measurement data. So I did get that and
5 looked at it.

6 CHAIRWOMAN HELTON:

7 So, now, would you go on with it? You looked at
8 it last week?

9 A. Yes, ma'am.

10 CHAIRWOMAN HELTON:

11 Okay.

12 Q. Okay. Ms. Rowling, I'm glad you brought that up,
13 because one of your other witnesses did as well. When
14 you had this alleged problem with getting into PMAP,
15 did you ever call the BellSouth Help Desk?

16 A. No, because I didn't realize there was anything wrong
17 because, when the screen came up that the PMAP site was
18 just under maintenance, that's why I just assumed
19 because that happens in other web sites for the ILECs.

20 Q. How many times in a row did you try it when it said it
21 was under maintenance?

22 A. I can't remember the exact count but several times
23 during the course of a week.

24 Q. Okay. And you never called the Help Desk?

25 A. No, ma'am, I did not, . . .

1 Q. Okay.

2 A. . . . thinking that it was just under maintenance.

3 Q. Okay. Did you call your Account Team for help?

4 A. I believe that's who we finally had to call to get the
5 different pass code.

6 Q. Okay. So, when you called your Account Team, it got
7 resolved?

8 A. Yes, it finally - well, keep in mind we called the
9 Account Team originally to get the user ID and the pass
10 code that we assumed would get us to the PMAP.

11 Q. Okay. Did you ever refer to BellSouth's web master for
12 assistance in this matter?

13 A. No. I can't say that I'm an expert on negotiation on
14 web masters and that sort of thing. So the answer to
15 that would probably be no.

16 Q. Okay. So you looked at these for the first time last
17 week?

18 A. Yes, I did.

19 Q. Do you understand that BellSouth's measure for FOC
20 timeliness measures the average time to return FOCs?

21 A. Well, can you please go ahead and let's go ahead and
22 turn over to where that BellSouth measurement is in Mr.
23 Coon's attachment so we could take a look at that?

24 Q. Sure. I'm sorry. I don't have those page numbers
25 written down. If we look at the Table of

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Contents, . . .

A. Yes. So which one would be the one that you're pointing out? No. 6, Page 15, would that be it, FOC's timeliness?

Q. Uh-huh.

A. Okay. So let me just turn there, if I might.

MR. KRAMER:

I'm sorry. Could you state where you are? We were just getting this out.

A. I was turning to Page 15 of Mr. Coon's Exhibit No. 1, . . .

MR. KRAMER:

Okay.

A. . . . which I think is the measurement that was indicated to me; is that correct?

Q. Yes, it is.

A. Okay.

Q. Thank you.

A. Okay. Yes, this is - the name of the measurement is "Firm Order Confirmation Timeliness," and, if you notice, under that measurement, a situation, if you turn to the following page, well, actually, if you turn to that page, Page 15, under "Business Rules," you'll notice that LNP, which is local number portability, says "Under development." If you turn to the next

1 page, Page 16, under "Retail Analog/Benchmark," it
2 indicates that "The benchmark is under development.
3 Retail Analog also under development." So, what the
4 two measurements are trying to get at - the Texas and
5 the BellSouth may touch on the same type of data
6 collection - what the concern is, is that this
7 particular measurement and other measurements for
8 BellSouth are under development. There's levels of
9 disaggregation. For example, the LNP, the local number
10 portability, is under development. So this particular
11 measurement would not provide me information on
12 receiving a FOC for an LNP order, and, in addition to
13 that, because the benchmark is still under development,
14 there is - so, regardless of the information I get,
15 let's say I get 20 percent of my FOCs back in five
16 hours of submittal, it still doesn't show me what's the
17 benchmark of where it should hit. Should it hit it in
18 five hours? Should it hit it in three hours or what?
19 Whereas, if we go back to the Texas performance
20 measure, it is articulated in terms of the
21 disaggregation as well as the benchmark and so that's
22 the significant difference. Just saying we have the
23 FOC return in one set, the FOC return in the other set,
24 the information isn't the same.

25 Q. Let me follow up on that real quick. Did you look at

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Mr. Coon's Exhibit DAC-2?

A. Okay.

Q. Have you reviewed that?

A. Yes, I have.

Q. Okay. So you're aware that, at least with respect to the LNP orders, those are going to be implemented on December 15 of this month; correct?

A. That's my indication insofar as his testimony in Tennessee. He indicated that on the stand, and also, since we turned to that particular Exhibit No. 2, the way the Exhibit is laid out, - a column on BellSouth, a column on ICG's Texas measurement - it would appear that it's a one-to-one correlation; you know, one measurement over here lines up with this measurement over here, and that's not correct, because, when you look through the measurements, the business rules that describe the measurement and what's being measured is not the same. So I . . .

Q. Okay. Ms. Rowling, let's just stick to the question; okay?

A. Okay. Okay. I'm sorry.

Q. What I asked you was, DAC-2, . . .

A. Yes.

Q. . . . LNP orders, Page 3, . . .

1 MR. KRAMER:

2 Madam Chairman, I'm going to object. Ms. Foshee
3 asked her question about Mr. Coon's Exhibit 2.
4 She was answering the question about Exhibit 2. I
5 don't think there's a valid objection because Ms.
6 Foshee was getting a fuller answer than she wanted
7 to hear. She asked her a question about it in the
8 course of her examination. She's entitled to
9 finish answering the question.

10 MS. FOSHEE:

11 Madam Chairman, I didn't ask for a full
12 dissertation on Exhibit 2. I asked for a specific
13 piece of it, and I'll . . .

14 CHAIRWOMAN HELTON:

15 Let me explain to the two of you, since I don't
16 think either one of you have been in this Hearing
17 Room before. We are an administrative hearing.
18 Strict rules of evidence we do not go by, and we
19 have provided witnesses much leeway, as a matter
20 of fact in previous arbitration hearings, a
21 tremendous amount of leeway in explaining these
22 complicated issues. So I would like to hear her
23 answer, and I would also like for you all to be a
24 little bit more direct in your questions and in
25 your answers.

1 A. Yes, ma'am.

2 MS. FOSHEE:

3 Yes, ma'am.

4 Q. Okay. Let's just look at Page 3, . . .

5 A. Okay.

6 Q. . . . DAC-2. We talked about LNP orders; correct?

7 A. Yes.

8 Q. If you look under the column on Mr. Coon's DAC-2, as of

9 December 15, we're going to have mechanized LNP;

10 correct?

11 A. That's correct.

12 Q. Okay.

13 A. That's what it indicates in this, that that's

14 apparently the target date.

15 Q. Okay. Thanks. And, with respect to some discussion we

16 had about the firm order confirmation timeliness, . . .

17 A. Uh-huh.

18 Q. . . . while I understand what you explained to the

19 Commission about certain things being under

20 development, you'll agree with me, from your review

21 last week of the PMAP data, that there is data

22 available to ICG on firm order confirmation timeliness;

23 correct?

24 A. Yes, there is data that's available. I . . .

25 Q. I understand it may not be the data you want, but there

1 is data available; correct?

2 CHAIRWOMAN HELTON:

3 There's data available. There's no benchmark

4 available; correct?

5 A. Yes, ma'am.

6 CHAIRWOMAN HELTON:

7 Okay. Could we move on?

8 MS. FOSHEE:

9 Yes, ma'am.

10 Q. Let's look at one other one very quickly, Ms. Rowling.

11 A. Uh-huh.

12 Q. Let's look at, on the Texas measurement, the mean

13 installation interval.

14 A. Okay.

15 Q. It's on Page 34 of my Exhibit, . . .

16 A. Okay.

17 Q. . . .so I'm guessing it's Page 35 of yours.

18 A. Okay. Let me go to that area, then.

19 Q. Measurement 27.

20 A. Mean installation interval.

21 Q. Okay. What does that one measure?

22 A. It measures, again, looking at the definition, the

23 average business days from application date to

24 completion date, meaning the installation date.

25 Q. Okay. Again, ICG would, presumably, consider this an

1 important measurement; correct?

2 A. That is correct.

3 Q. Okay. And have you ever looked up BellSouth's

4 performance data for ICG on the BellSouth measurement

5 of order completion interval?

6 A. Can we turn to that particular measurement under the

7 BellSouth?

8 Q. Sure, we can, but I was just asking if you had ever

9 looked it up on the web.

10 A. It refreshes my memory, if we could.

11 Q. Sure. Again, I've got to check the Table of Contents.

12 It's order completion interval.

13 A. Is that IV, under "Provisioning," in the Table of

14 Contents?

15 Q. Absolutely. Yeah. You're faster than I am.

16 A. Page 24.

17 Q. And I just want to know if you've ever looked up this

18 data on the web.

19 MR. KRAMER:

20 Creighton, where is it? Creighton, where is it;

21 Page 24?

22 CHAIRWOMAN HELTON:

23 Page 24.

24 MR. MERSHON:

25 Page 24.

1 A. Yes, that is one of the ones that we did look at it.
2 Q. Okay. And last week was the first week you looked at
3 it?
4 A. The first I personally looked at it.
5 Q. Okay. You don't have any information that anyone else
6 at ICG looked at it before last week; do you?
7 A. As a matter of fact, it's my understanding, in talking
8 with our Service Delivery Team, that someone else -
9 it's my understanding, first of all, that the PMAP has
10 been up since April of this year. At least, that's
11 what the notification is from BellSouth, and it's my
12 understanding that we did have an employee head-
13 quartered in Atlanta that was looking at the
14 performance measurements provided by BellSouth, and,
15 again, may I just point out, on Page 25, which is in
16 the same measurement, the level of disaggregation as
17 well as the benchmark are missing from the BellSouth's
18 performance measurement on this particular one, and,
19 again, looking at the data, if I might, looking at the
20 exact data that's on the PMAP, this shows what the
21 completion is when it doesn't show UNE combinations.
22 It doesn't show the switching. It doesn't show even
23 what the benchmark is. It doesn't provide us with the
24 exact information of what we're looking for in order to
25 ensure performance is being - standards are being met.

1 Q. Okay. Ms. Rowling, I didn't see it attached to your
2 testimony. Did you prepare a point-by-point comparison
3 of the two proposals for the Commission?
4 A. No, I did not.
5 Q. Okay.
6 A. We would be happy to do so, but we did not include that
7 in our testimony.
8 Q. Okay. Now, another thing that you stated, as I
9 understood from your testimony, was that the ICG
10 proposal is more complete because it has 121
11 measurements, I think is the number; is that correct?
12 A. I don't think that my point is that it's more complete
13 just because of the sheer number of measurements. I
14 think it's more complete in terms of the business rules
15 are fully matured so that the performance measurements
16 can be operational, can be functional. So the
17 information in the calculation, the statistical
18 calculation of the information, is there in the Texas
19 plan. It is not there in the performance measurements
20 that BellSouth presents. The measurements themselves
21 are just one small part of the whole process. The
22 measurements have to also be fully articulated and
23 functional in terms of what they're measuring, how the
24 data is calculated, the statistical methodology
25 applied. In Texas, it's the modified Z-test in order

1 to calculate whether or not the performance is meeting
2 benchmark or parity, whatever standard it is. The
3 BellSouth measurements do not have that, do not
4 incorporate that. So, when I say "fully," not as
5 complete, I'm referring in terms of functional
6 completeness as well as operational areas that
7 BellSouth does not monitor in their performance
8 measurements, like DSL provisioning and other areas.

9 Q. Okay. Just one more quick question about the
10 measurements. On Page 9 of your rebuttal, Lines 16
11 through 17, . . .

12 A. Okay. Let me just get to that.

13 Q. Sure. Let me know when you're there.

14 A. Okay. What was the page again?

15 Q. Sure. Page 9, Lines 16 through 17.

16 A. Page 9. Okay.

17 Q. You state that "It would be preferable for the
18 Commission to adopt a plan that can be immediately
19 implemented in order to protect the growth of local
20 competition." Are you aware that BellSouth has been
21 working on its SQMs for over two years?

22 A. I'm very well aware of that. In fact, I've recently
23 seen a letter that you all filed in Georgia saying, I
24 think it was a year and a half, but I'm aware you've
25 been working on them for a long time, which is part of

1 our concern and disappointment, that, even though
2 they've been out there for a long time, they're not, in
3 fact, complete and fully functional.

4 Q. Okay. And you're aware, also, I assume, that BellSouth
5 has spent over \$50 million to implement its current
6 SQMs.

7 A. I'm afraid I can't tell you how much you've spent.

8 Q. Okay. But your position is that the ICG proposal could
9 be implemented by BellSouth immediately; is that
10 correct?

11 A. In terms of having - yes, I do believe, in terms of
12 having - first of all, there is some overlap, but we do
13 need to set benchmarks, the standards, and add the
14 statistical calculation. Texas, too, worked for over a
15 year and a half on these performance measurements, and,
16 rather than to save resources in terms of putting
17 something that's operational immediately in an
18 interconnection agreement, what we're doing today, what
19 ICG is doing today, in Kentucky, is actually measured
20 in a full and complete manner, because we've made an
21 investment in this state, and we have customers in this
22 state, and we have operational issues in this state.

23 Q. Okay. Let's talk about the penalties.

24 A. Okay.

25 Q. Under your proposal, your Tier 1 penalties are going to

1 be paid to ICG; correct?

2 A. It's paid to the CLEC.

3 Q. Okay. And Tier 2 will be paid to the state; correct?

4 A. That is correct.

5 Q. Okay. So we can agree, and I think you admit in your

6 testimony, that the Tier 2 payments are penalties;

7 correct?

8 A. Actually, I think they're called, in the Texas plan,

9 assessments.

10 Q. And I think you call them penalties in your testimony,

11 if you'll look on Page 7 of your rebuttal.

12 A. Okay.

13 Q. So I'm assuming that we can agree on that.

14 A. Let me get back to the rebuttal.

15 Q. It's Line 15.

16 A. Okay. Okay.

17 Q. You say, ". . . while Tier 2 payments are remitted to

18 the state as penalties."

19 A. Yes. In the Texas plan, they referred to penalties as

20 well as assessments.

21 Q. Okay.

22 A. The two words are used.

23 Q. Okay. Did ICG submit any cost studies to support the

24 amounts of either your Tier 1 or your Tier 2 payments?

25 A. Because Texas developed this plan not just for ICG

1 specific but for the CLEC industry as a whole, no, no
2 cost studies were produced for ICG in particular.
3 Q. Okay. And does ICG have any data to substantiate the
4 appropriateness of these payments?
5 A. If we could please turn to . . .
6 Q. Absolutely. If you could just answer my question yes
7 or no and then I would be happy to have you explain.
8 A. Is there information as far as the amounts are
9 concerned?
10 Q. Does ICG have any data to support the appropriateness
11 of these payments for ICG?
12 A. Yes. I would like to turn to, if I might, my Exhibit
13 2, . . .
14 Q. Okay.
15 A. . . . which is Attachment 17. It's labeled "Attachment
16 17," and turn to Page 5, please, Section 6.1, the
17 second full sentence, "By incorporating these
18 liquidated damages terms into an interconnection
19 agreement, SWBT and CLEC agree that proof of damages
20 from any 'noncompliant' performance measure would be
21 difficult to ascertain and, therefore, liquidated
22 damages are a reasonable approximation of any
23 contractual damage resulting from a noncompliant
24 performance measure. SWBT and CLEC further agree that
25 liquidated damages payable under this provision are not

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intended to be a penalty." This is referring to the Tier 1 damages. So the whole point of the Texas plan was to try to come to a reasonable approximation of the damages that CLECs would individually suffer, and, in fact, BellSouth incorporates this language almost verbatim in their FCC proposal which they, too, proposed Tier 1 and Tier 2 damages and penalties and assessments.

Q. Okay. I'm well aware of what your Attachment 17 says, but my question is, do you have any data or evidence to support the payments that you propose to this Commission are a reasonable approximation of damages that ICG might suffer in Kentucky?

MR. KRAMER:

Objection. Asked and answered.

MS. FOSHEE:

I'm not sure she did answer.

CHAIRWOMAN HELTON:

Do you have any data?

A. No, ma'am.

CHAIRWOMAN HELTON:

Thank you.

Q. Thank you. Okay. Let's talk about the caps real quickly. On Page 11 of your direct, and I think that may be the testimony we worked on earlier, . . .

1 A. Okay.

2 Q. Are you there?

3 A. Yes.

4 Q. Okay. So there's a \$120 million annual cap, and then
5 we talk about a \$3 million to a single CLEC monthly
6 cap, and I think you confirm this in your testimony,
7 but I just want to make sure. The monthly \$3 million
8 amount is not a true cap; is it? My understanding is
9 it's, at that point, that the ILEC has the opportunity
10 to come in and try to make a case as to why they
11 shouldn't pay any more; correct?

12 A. Because they made so many changes to this particular
13 section, let's make sure I'm answering the question
14 directly.

15 Q. Absolutely.

16 A. There is an overall annual cap of financial liability
17 for the ILEC under this plan for any amounts paid out
18 of \$120 million, period. There is a monthly cap
19 payable to an individual CLEC of \$3 million. Now, at
20 the end of the year, if the \$120 million, in fact, has
21 not been paid out but the individual CLEC, instead of
22 the one month, only got \$3 million because of that
23 monthly cap but the damages suffered and the
24 misperformance measurement really meant that they
25 should have been paid \$3.1 million, let's say, if

1 there's money left over in the \$120 million cap, then
2 the system goes back to day one and proactively pays
3 out to the individual CLECs and that's how that monthly
4 cap figures into the annual cap.

5 Q. Okay. I think you actually hit my question right on
6 the head. I want to make sure I have this clear. It's
7 my reading of your proposal that the \$3 million number
8 in a month is not a cap, as you called it, but rather
9 it's a point at which the ILEC can file a show cause
10 proceeding and come in and argue to this Commission as
11 to why it shouldn't pay any more. Am I wrong about
12 that?

13 A. You're correct. In Attachment 17, it does discuss that
14 the \$3 million there is a show cause proceeding that
15 can be initiated, but, again, if the \$120 million is
16 paid out, there is no additional financial liability
17 for the ILEC.

18 Q. Okay. But, hypothetically, if an ILEC just had a
19 really bad month, it, arguably, could pay more than
20 \$3 million in a month; right?

21 A. If, at the end of the year, they hadn't paid out the
22 whole \$120 million, that is correct.

23 Q. Okay.

24 COMMISSIONER GILLIS:

25 But they can only file that once a year, not

1 monthly; is that correct? The show cause can only
2 be filed at the end of the year . . .

3 CHAIRWOMAN HELTON:
4 Reconciliation.

5 COMMISSIONER GILLIS:
6 . . . if the \$120 million has not been met?

7 A. Well, I think I might answer that more accurately by
8 saying it only would be effective at once a year, in
9 other words, that there might be a show cause
10 proceeding if they missed it continually every month,
11 but the CLEC wouldn't get any damages or penalties over
12 the \$3 million unless it was that proactive paying out
13 of the extra money that was left over from the \$120
14 million fund.

15 Q. Now, Ms. Rowling, as I understand it, there wasn't any
16 modification of this proposal from Texas to Kentucky;
17 correct?

18 A. You're absolutely correct, and that does bring - may I?

19 Q. Sure.

20 A. Okay. There was not. There was not. We did take the
21 complete Texas plan and put it into our testimony, but
22 that does bring a point that I would like to make as
23 far as a potential readjustment to the Texas plan. The
24 Texas plan has \$120 million cap which we just
25 discussed. I also included - and I don't mean to be

1 lengthy, but I do want to present this. I also
2 included a letter from the FCC, Larry Strickling, who
3 wrote a letter to SBC and said that they thought, the
4 FCC thought, the \$120 million cap was too low. It only
5 represented 2.19 percent of Southwestern Bell's local
6 revenues. The point that the FCC was trying to make is
7 that the penalties, the financial liability, has to be
8 significant enough to compel compliance. Now, I
9 recognize very clearly that BellSouth's local revenues
10 in this state is not as much as Southwestern Bell in
11 Texas. The cap maybe should be adjusted for BellSouth,
12 because I think, with a \$120 million cap for Kentucky
13 alone, it comes out to maybe 14-15 percent of what I
14 think the estimated gross revenues for BellSouth is
15 which I think is like \$800 million. I mean, I might be
16 wrong. I'm estimating that, just pulling up some
17 publicly available data. It's interesting, though,
18 that, in BellSouth's proposal to the FCC, it proposed a
19 \$120 million cap for all of BellSouth's states
20 regionwide, and, for Kentucky, it proposed a \$6 million
21 cap. That \$6 million cap, if we look at \$6 million,
22 would only be, I think it was, .75 percent, not even
23 1 percent of a proportion of BellSouth's gross of local
24 revenues. So what I'm trying to get at is that we
25 potentially do need to readjust that kind of a cap here

1 in Kentucky. A hundred and twenty million dollars for
2 BellSouth in Kentucky is too much; six million is too
3 low. So somewhere.

4 CHAIRWOMAN HELTON:

5 Let's do a further comparison.

6 A. Yes, ma'am.

7 CHAIRWOMAN HELTON:

8 There's a \$10 million cap on all CLECs in Texas
9 per month that SWBT would have to pay out if they
10 did not meet their performance measurements.

11 Let's compare that to Kentucky; not in dollar
12 terms but in number of CLECs. How many CLECs are
13 there in Texas operating; do you know?

14 A. I don't know as far as the number of certificated
15 CLECs. It's different than the number of operating
16 CLECs, . . .

17 CHAIRWOMAN HELTON:

18 Right.

19 A. . . . and I'm afraid I don't know the exact number of
20 operating CLECs.

21 CHAIRWOMAN HELTON:

22 Okay. Ms. Foshee?

23 MS. FOSHEE:

24 Thank you.

25 Q. We may have to give Creighton a raise if the revenues

1 went up to \$800 million.

2 A. We pulled it as far as ARMIS data, I think it is. It's

3 called . . .

4 Q. I'm just kidding. Okay. There's two other quick

5 things I want to go over, and then I think I'm going to

6 be done.

7 A. Okay.

8 Q. On Page 16 of your direct testimony, you talk about the

9 fact that penalties are good because they take the, I

10 think the quote, "He said/she said," out of the

11 process. It's Line 12.

12 MR. HATFIELD:

13 What page was that?

14 MS. FOSHEE:

15 Page 16.

16 A. Page 16? Okay.

17 Q. Yes, ma'am, of your direct.

18 A. Okay. Yes. Uh-huh. I'm there.

19 Q. ICG and BellSouth sometimes disagree today as to whose

20 fault certain performance issues are; correct?

21 A. I'm sure that might be correct.

22 Q. Okay. And, with millions of dollars on the line, it's

23 probably fair to say that these disputes over fault

24 would probably increase; do you agree with that?

25 A. No, not necessarily; I don't.

1 Q. Okay. Well, let's say we just have the number of
2 disputes we have today. Under your procedure, the
3 Commission is still going to have to resolve those
4 disputes; correct?

5 A. No, that's not correct in terms of our proposal because
6 we're asking for self-executing enforcement mechanisms
7 so we don't have to come and litigate each operational
8 issues on a month-to-month basis. That is, in fact -
9 and utilize the CLECs' resources, BellSouth's
10 resources, and the Commission's resources.

11 Q. And, to the extent the parties don't agree as to
12 whether those mechanisms should be enacted, there's
13 going to be a dispute; correct?

14 A. I'm sorry. You said the mechanisms should be enacted?

15 Q. I'm sorry. Let me rephrase it. To the extent that the
16 parties don't agree that, in a certain situation, a
17 penalty should apply, the parties are going to have a
18 dispute about that; correct?

19 A. If there's any disagreement, we're looking at actual
20 objective data in terms of the number of orders
21 submitted, the FOCs that were returned, the SOC's that
22 were returned. So, instead of, when I say a "He
23 said/she said," a descriptive dispute, it's actual
24 data that's put forward and so that's part of the
25 issue, and I don't know of any dispute in Texas where a

1 CLEC has disputed the actual raw data after looking at
2 the raw data.

3 VICE CHAIRMAN HOLMES:

4 Have there been any disputes in Texas once the
5 performance measurements have been adopted between
6 the CLEC and ILEC, and how was that resolved?

7 A. Yes, sir, there have been - although ICG is not one of
8 them, there have been disputes in terms of the
9 complaint process filed in Texas, and I know of at
10 least two that I'm aware of, and they're working out
11 certain operational dispute issues that have occurred
12 in the Southwestern Bell back office systems in regards
13 to provisioning UNE platform.

14 VICE CHAIRMAN HOLMES:

15 Does that go to the Commission for resolution
16 or . . .

17 A. As a matter of fact, that's being worked out informally
18 with staff and Southwestern Bell and the CLEC.

19 VICE CHAIRMAN HOLMES:

20 Thank you.

21 CHAIRWOMAN HELTON:

22 Ms. Foshee?

23 Q. Ms. Rowling, you understand that, in Georgia, in lieu
24 of penalties, the Georgia Commission adopted an
25 expedited dispute resolution process for these type of

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issues?

A. I'm aware that Georgia had an expedited dispute resolution process that they adopted on an interim basis. However, they have never actually gone through the required rulemaking process under Georgia's APA to actually finalize to finally adopt those, and it's my understanding that that's required by Georgia law. I'm not an attorney, but I believe that is. So I'm aware of that situation in Georgia.

Q. Okay. Well, let's put aside the legalities of it. My understanding is that ICG in Georgia has never availed itself of that process; correct?

A. No, we did not.

Q. Okay.

A. As a matter of fact, there has only been two CLECs that attempted to use that process. One CLEC, MFS, filed a complaint in '97, and, even though the procedures had not been finalized at that point in time, they had been written. The dispute resolution procedures had not been finalized but they had been written, so to speak. So they decided to use those procedures in that particular complaint. The complaint was filed in '97, and let's see. The Order affirming the Hearing Officer's decision was entered in December of '98, and BellSouth filed for a stay. That was denied, but

1 BellSouth did file for an appeal of the decision. So,
2 in that case, that particular complaint didn't work
3 very expeditiously. The other case that I'm aware of
4 the parties decided to more or less suspend it. It's
5 not resolved yet, but those are the only cases that
6 have ever been filed.

7 Q. But, Ms. Rowling, it's your position that that MFS case
8 that you're referring to was decided under the Georgia
9 Commission's expedited dispute resolution in its
10 performance measurement docket?

11 A. No, I did not say it was performance. I thought your
12 question was in regards to had anybody, ICG, used the
13 Georgia expedited rulemaking process.

14 Q. I'm sorry. If that was your understanding, it was my
15 fault. I wasn't clear in my question. I was talking
16 about the expedited dispute resolution process that the
17 Commission implemented specifically to address
18 performance issues.

19 A. That's the same Georgia expedited process that they
20 adopted in the performance measurement Order. It's the
21 same one that MFS and MGC used; yes, ma'am.

22 Q. Okay.

23 A. It is.

24 Q. Okay. Let's see. I think that may be all my
25 questions. Well, let me just ask one follow-up

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question on that and then I think I'm done. The only reason I mentioned the Georgia expedited dispute resolution process is that I think one of the reasons that you think penalties are appropriate is because you contend that a complaint resolution process won't work, and, at least with respect to one that has been set up in Georgia, ICG doesn't have any first-hand experience as to whether it will work or not; does it?

A. No.

Q. Okay.

A. Apparently, only two CLECs do.

MS. FOSHEE:

That's all of my cross. Thank you, Madam Chairman.

CHAIRWOMAN HELTON:

Ms. Dougherty, we'll take a break before you begin questions.

MS. DOUGHERTY:

I have no questions.

CHAIRWOMAN HELTON:

Okay. We'll still take a break.

OFF THE RECORD

CHAIRWOMAN HELTON:

Mr. Kramer, redirect?

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MR. KRAMER:

Yes. Thank you.

REDIRECT EXAMINATION

BY MR. KRAMER:

Q. Ms. Rowling, do you remember you and Ms. Foshee had a discussion about the caps and the caps on an individual CLEC?

A. Yes.

Q. Could it ever happen that BellSouth would be required to pay an amount anywhere near the cap based on a single instance or a single incident? How does Bell reach those caps?

A. The way that the structure of the assessments is, is that a single instance of a missed installation date, for example, is not going to even result in any kind of monetary payment by the ILEC, and here's the reason why. There are several reasons, actually, why. The Texas plan is extremely forgiving to the ILECs' misperformance. I mentioned a statistical calculation in order to ensure that the perception of missed or substandard performance is actual. So there's a 95 percent chance that is statistically built into this plan that statistically it will demonstrate that the ILEC actually did cause to have happen substandard performance. Some other plans may be 85 percent

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certainty but Texas set it very high at 95 percent statistically. In addition to that, the Texas plan, if you notice, the benchmarks under the business rules, which is my Attachment 1, the benchmark - sometimes you have to hit 95 percent of the benchmark. So sometimes they don't even have to hit the full benchmark every time. In addition to that, in Attachment 17, which is my second Exhibit, there is what's called a K-value table in that Attachment 17 and what that is, is a list. If a CLEC, because of their operations in a particular state, has 70 measurements one month, the K-value goes across for 70 measurements applicable to that particular CLEC, the one, two, whatever, there's a particular number of measurements that are missed that are really thrown out. They're excluded from any payments. In addition to that, Tier 2 assessments are only payable if the ILEC misses them for three straight consecutive months. So they can miss them in January, make them in February, and miss them again the following month, and there's no Tier 2 assessments on the ILEC. So Point No. 1 is the plan statistically is structured so it's very forgiving to the ILEC, and we're to make sure that the ILEC doesn't suffer undue financial harm, and the second point is, the way that the measurements are structured, one missed instance of

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a missed installation date is not going to result in penalties or assessments.

Q. Does the \$120 million cap apply in any event and under any circumstance?

A. The ILEC cannot exceed a \$120 million cap. It will never go to \$120 million plus one dollar.

Q. Remember you and Ms. Foshee also discussed the Georgia expedited complaint procedure?

A. Yes.

Q. Do you have a problem generally with complaint procedures, expedited or not?

A. In terms of theoretically, no, but the concern I have is, in terms of the performance measurements, it's my belief that performance measurements and self-executing enforcement mechanisms serve the purpose to ensure that benchmarks are being met, that the CLEC is truly getting nondiscriminatory access to essential facilities, and, again, I refer back to the Texas plan. There was a public policy issue to ensure that widespread systemic noncompliance with 251 and 252 did not occur. Hence, that's why Tier 2 assessments came about in the first place. The complaint process only deals with single instances of operational issues. So every month that performance measurements aren't met, firm order confirmations or installs aren't met, or

1 coordinated hot cuts are not met, customers are out of
2 service for more than 24 hours, etc., etc., those daily
3 operational issues that happen continually for the
4 CLEC, that we don't continually have to come back to
5 the Commission and litigate every month these issues.
6 So, in terms of procedurally, in terms of drain on the
7 resources, we're a smaller company than BellSouth. We
8 don't have the resources to come to this Commission
9 every month on these issues and that's why self-
10 executing enforcement mechanisms is important.

11 Q. You and Ms. Foshee had a discussion about looking at
12 the data contained on the PMAP?

13 A. Yes, sir.

14 Q. How useful is the data contained on the PMAP at this
15 point?

16 A. It's not useful, sir. It's not useful because of the
17 benchmark . . .

18 CHAIRWOMAN HELTON:

19 Just a second.

20 A. Yes, ma'am.

21 CHAIRWOMAN HELTON:

22 Would you restate that question?

23 MR. KRAMER:

24 I'm sorry?
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CHAIRWOMAN HELTON:

Restate the question. I didn't quite hear.

MR. KRAMER:

Yes. Oh, sure. I'm sorry. I didn't hear you. I asked how useful the data on the PMAP is. That's the BellSouth web site.

CHAIRWOMAN HELTON:

Yes, I know what it is.

MR. KRAMER:

Okay.

CHAIRWOMAN HELTON:

I just didn't hear the "how useful."

A. I didn't find it very useful. You have listed, on a state-by-state basis, for example, a number of orders the percent missed. Again, just to take an example - in columns, and, again, without any kind of benchmark, I don't know where we are in relation to how BellSouth is provisioning service to its own retail customers or how BellSouth is doing in terms of other CLECs, aggregate CLECs. To me, there's no threshold. So, if I'm getting this percent of my orders rejected, 20 percent of my orders rejected, I have no idea if that's comparable to what happens to BellSouth's own orders or if it's way out of line. So I don't have a relational picture and that's the point.

1 Q. Do you remember you mentioned the Larry Strickling
2 letter, Chief of the Common Carrier Bureau letter,
3 regarding the insufficiency of the amount of the caps
4 that BellSouth was potentially exposed to?

5 A. Yes, sir.

6 Q. Is that letter included in your testimony?

7 A. Yes, sir, it is. I believe it's Attachment 3.

8 Q. Okay.

9 A. Okay.

10 MR. KRAMER:

11 I'll just check my note cards. That's all I have,
12 Madam Chairman.

13 CHAIRWOMAN HELTON:

14 I think you said BellSouth. I believe the letter
15 refers to Southwestern Bell.

16 MR. KRAMER:

17 Oh, thank you. You're correct.

18 CHAIRWOMAN HELTON:

19 Recross?

20 MS. FOSHEE:

21 Chairman Helton, one matter. If the Commission
22 would find it appropriate or helpful - Ms. Rowling
23 referred to the data that's available on PMAP and
24 Mr. Coon can discuss it as well. BellSouth would
25 certainly be willing to file, as a late-filed

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Exhibit, an example of the data that can be pulled off PMAP in aggregate CLEC form so we don't reveal any ICG proprietary information, if that's something in which you would be interested.

CHAIRWOMAN HELTON:

Ms. Dougherty, I believe we have access to PMAP; do we not?

MS. DOUGHERTY:

Yes, we do.

CHAIRWOMAN HELTON:

Therefore, we do not need it in the record.

MS. FOSHEE:

Great. Okay. Thank you.

CHAIRWOMAN HELTON:

You had no other questions?

MS. FOSHEE:

No, ma'am. Thank you.

CHAIRWOMAN HELTON:

Thank you, Ms. Rowling.

A. Thank you.

MR. KRAMER:

Madam Chairman, shall we proceed?

CHAIRWOMAN HELTON:

Yes.

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MR. KRAMER:

We'll call Michael Starkey.

WITNESS SWORN

The witness, MICHAEL STARKEY, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Please state your name and address for the record.

A. My name is Michael Starkey, and my address is 6401 Tracton Court in Austin, Texas. The zip code is 78739.

Q. Could you describe your position and your responsibilities in that position?

A. I am the President of QSI Consulting, Inc. QSI Consulting is a consulting firm that focuses primarily on telecommunications and policy and econometric and technical aspects of telecommunications.

Q. Mr. Starkey, did you cause to be filed in this proceeding direct testimony consisting of 42 pages and four Exhibits?

A. That's correct.

Q. Was this testimony prepared by you or under your supervision?

A. Yes, it was.

Q. And, Mr. Starkey, did you also cause to be filed in this proceeding the rebuttal testimony of Michael

1 Starkey consisting of some 58 pages and one Exhibit?
2 A. Yes, I did.
3 Q. And, Mr. Starkey, was the rebuttal testimony prepared
4 by you or under your supervision?
5 A. Yes, it was.
6 Q. Do you have any corrections to either your direct
7 testimony or your rebuttal testimony?
8 A. Yes, I just have two corrections, one to my direct and
9 then one to my rebuttal. You'll notice, on the first
10 page of my direct, the address at Lines 2 and 3 don't
11 match the address I just provided. I have moved. So I
12 would remove the Chicago address that is there and
13 replace it with the Austin, Texas address I just
14 provided. Also, with respect to my rebuttal, at Page
15 45, Lines 26 and 27, there's a parenthetical in that
16 sentence that I would remove and that would be all of
17 my corrections.
18 Q. And if I asked you each of the questions contained in
19 your direct testimony and your rebuttal testimony at
20 this time, would your answers be the same?
21 A. Yes, they would.
22 MR. KRAMER:
23 Madam Chairman, at this point, I move the
24 admission of Mr. Starkey's testimony, as
25 corrected, with the Exhibits, and the witness is

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tendered for cross.

CHAIRWOMAN HELTON:

So ordered. Mr. Kitchings?

MR. KITCHINGS:

Thank you, Chairman Helton.

CROSS EXAMINATION

BY MR. KITCHINGS:

Q. Hello, again, Mr. Starkey.

A. Good morning, Mr. Kitchings.

Q. Is it correct that you graduated from Southwest Missouri State with a bachelor's degree in economics?

A. That's correct.

Q. What year was that?

A. That was 1991.

Q. Do you hold any postgraduate degrees?

A. I do not.

Q. In the eight years since you graduated, by my calculation, you've worked for the Maryland, Missouri, and Illinois Commissions and then with two consulting firms; is that correct?

A. Yes, sir, that's correct.

Q. When did you shift from Commission work to consulting work?

A. I believe we started CSG in January 1 of 1996, . . .

Q. Thank you.

1 A. . . . and I left the Maryland Commission to begin that
2 post.
3 Q. Okay. Thank you. Mr. Starkey, I believe in your
4 testimony you've stated that there is no functional
5 difference between local voice calls and ISP-bound
6 calls; is that correct?
7 A. Yes. I think I describe the extent to which they both
8 use the same network, the same facilities, and are
9 provided the same functions within the network; yes.
10 Q. Okay. Can we agree that the FCC, in its Declaratory
11 Ruling, determined that ISP-bound calls do not
12 terminate at the ISP but instead continue on to the
13 "ultimate destination or destinations," which means the
14 Internet web sites?
15 A. The FCC did make a determination regarding the
16 termination of traffic. The only additional
17 information I provide with that is that the FCC has a
18 very specific definition of the word "terminate" that
19 they define in Part 69 of their rules. So I don't
20 think they were making a determination with respect to
21 the functional nature of the traffic as much as they
22 were the regulatory nature of the traffic or the
23 jurisdictional nature of the traffic.
24 Q. Okay. Is there anywhere in the FCC Order where they
25 distinguish between the technical or jurisdictional

1 termination of the traffic?
2 A. I don't know if it's in the Declaratory Ruling itself,
3 but, as I suggested, Part 69 of their rules very
4 specifically defines the term "terminate," and I think,
5 if you read the Declaratory Ruling, you'll understand
6 that they're using the word "terminate" in the
7 Declaratory Ruling to be very specific about the
8 jurisdictional nature of the traffic. I don't think
9 they're talking and I don't think they do talk about
10 the functional nature of the traffic and any
11 consequence of it terminating at the ISP might have on
12 that functional capability.
13 Q. Is it fair to say, though, that the FCC agreed that
14 they would look at the traffic from end-to-end; that
15 is, from the end user who's making the call to the end
16 of the call which they view as being at the Internet
17 web site which is being viewed?
18 A. I think that is a fair characterization, and, again, I
19 think it highlights the fact that that's sort of part
20 and parcel of them defining the jurisdiction of the
21 call. Again, I don't think the Declaratory Ruling is
22 really speaking to the functional nature of the call as
23 much as it is to the regulatory distinction.
24 Q. Do you have a copy of your testimony there with you?
25 A. Yes, sir.

1 Q. Could I direct you to your, I believe it is, MS-2 of
2 your Exhibit 2 to your direct testimony? It's labeled
3 "Diagram 1," but it is, in fact, Exhibit No. 2.
4 A. Okay.
5 Q. Okay. Now, in that diagram, you show "Terminating
6 Customer," as is residential here, above "ICG Central
7 Office" box; is that correct?
8 A. Yes.
9 Q. Now, you were here earlier; were you not?
10 A. Yes.
11 Q. Did you hear ICG's witness, Mr. Holdridge, state that
12 ICG has no residential customers in Kentucky?
13 A. Yes, I did hear him say that.
14 Q. Okay. Now, looking at the bottom half of that diagram,
15 the "ICG Central Office," then there's a line that is
16 drawn to "ISP Customer," given that the FCC has found
17 that the traffic terminates, given the meaning of that
18 word in Part 69, as you pointed out, wouldn't it be
19 more appropriate to draw an additional line to the
20 Internet beneath "ISP Customer" to reflect where that
21 traffic goes?
22 A. It would depend completely on what it was you were
23 trying to show and what I was trying to show here was
24 the facilities of either BellSouth or ICG that were
25 used in carrying that call, and these are all of the

1 facilities of those two carriers and the facilities
2 that are at issue, is my understanding, in this
3 proceeding. These are the entirety of those
4 facilities. So I didn't include that line because it
5 simply wasn't relevant.

6 Q. Well, there aren't any facilities that ICG uses to go
7 to residential customers; are there? Because they
8 don't have any residential customers.

9 A. I used the term "residential." You could replace that
10 term with "business" or "small business" or really any
11 other type of customer, and the analysis would remain
12 the same. So I really was just trying to, with this
13 diagram - and I think in my testimony I describe it as
14 a simplistic diagram - . . .

15 Q. Okay.

16 A. . . . I was really simply trying to show the facilities
17 of ICG's and BellSouth's that were at issue.

18 Q. Okay. Now, Mr. Starkey, are you aware that BellSouth
19 keeps track of all the numbers it has for its ISP
20 customers?

21 A. Yes. My understanding is that that is their intention.

22 Q. And are you aware that ICG knows who its ISP customers
23 are within the State of Kentucky?

24 A. I hesitate in that respect. My guess would be that, if
25 endeavored to do so, they could probably identify

1 those, and I would hesitate with my same answer with
2 respect to BellSouth. It's a manual process of
3 identifying those particular numbers. So the ability
4 to do that, you know, with 100 percent accuracy is
5 probably in question, but I would agree with you that
6 they probably could try to do that.

7 Q. Okay. Are you aware, sir, that they provided us a
8 number, which I will not give because it's proprietary,
9 but they provided us a specific number through Data
10 Requests of the number of ISPs that they serve here in
11 Kentucky?

12 A. Yes, my understanding is that they provided those
13 numbers through discovery.

14 Q. All right. Thank you. Mr. Starkey, you've testified
15 on behalf of ICG in this proceeding now in six states;
16 is that correct, this being the sixth?

17 A. I believe that's correct; yes.

18 Q. Okay. And one of those states was North Carolina; was
19 it not?

20 A. Yes, it was.

21 Q. Okay. And, in North Carolina, you filed some
22 additional testimony that was styled "Supplemental
23 Testimony"; did you not?

24 A. Yes, I believe it was styled that way.

25 Q. Now, just to put this in context for the Commission,

1 this would have been filed in late July or early August
2 as that proceeding went forward in early August;
3 correct?

4 A. My memory is fading, but, subject to check, I think
5 that's probably right.

6 Q. Okay.

7 MR. KITCHINGS:

8 May I approach the witness, Chairman Helton?

9 CHAIRWOMAN HELTON:

10 Yes.

11 MR. KITCHINGS:

12 Thank you.

13 Q. Mr. Starkey, I would ask you to take a quick look at
14 what I've handed you and would purport to be your
15 supplemental testimony that we were discussing a moment
16 ago that was filed in North Carolina in late July or
17 early August. Could you take a look at that and please
18 affirm my identification?

19 A. Yes, that appears to be what it is.

20 Q. Okay. Now, that testimony was filed in response to a
21 North Carolina Utilities Commission directive that both
22 sides apply some "creative thinking" to the dispute
23 over ISP traffic; correct?

24 A. Yes, it was and you quoted the term they used. It was
25 the North Carolina Commission. We had filed our direct

1 testimony and I believe our rebuttal testimony as well,
2 and the North Carolina Commission came back to both
3 parties and asked that they apply some creative
4 thinking to this particular issue to come up with
5 perhaps some additional proposals that would provide
6 some additional options for them on the record, and
7 this was my testimony in that respect.

8 Q. And BellSouth, of course, had the same directive, and
9 Mr. Varner, at that time, presented BellSouth's plan at
10 that point in time; correct?

11 A. Yes.

12 Q. Okay. Now, isn't it also true that BellSouth has
13 offered other solutions, such as track and true-up and
14 bill-and-keep?

15 A. Yes. Mr. Hendrix includes three options in his
16 testimony.

17 Q. Okay. Now, you didn't make - well, let me back up for
18 just a second. For shorthand purposes, would it be
19 accurate for me to call this the adjusted call length
20 proposal?

21 A. Yes, I think you could call it that.

22 Q. All right. You did not make the adjusted call length
23 proposal in this proceeding; did you?

24 A. No, sir, we didn't. If you'll look at Page 2 of my
25 testimony there, and it looks like I may have made this

1 mark on an earlier copy of yours in a different state,
2 at Lines 9 through 11, I explain that ICG's proposal in
3 this particular piece of testimony is not something
4 that we think is the best way to do things. We think
5 it's economically sound, in some sense, but certainly
6 we didn't think and continue not to think that this is
7 the proper way to do it.

8 Q. Okay, but, as a matter of policy, shouldn't the
9 Commission consider as many different proposals in
10 resolving this difficult issue?

11 A. Certainly the Commission could and should look at
12 proposals, but they should ultimately arrive at - my
13 hope is that they'll ultimately arrive at the one that
14 is the most economically efficient and sound, and we
15 think the one that we've presented in this case meets
16 that criteria more so than this one.

17 Q. Mr. Starkey, I would direct your attention, as we've
18 done before, to Page 4, Lines 13 through 17, and ask
19 you to read those sentences, please, or actually it's
20 just one long sentence.

21 A. Okay. It says, "Also, because the traditional models
22 assume an 'average length of call' in their calculation
23 (and that average length of call has generally been
24 assumed to be approximately 3 to 4 minutes in length
25 compared to the approximately 20 minutes in length for

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an average ISP bound call), ISP calls recover more 'Set Up' cost than they actually generate."

Q. Okay. Would you now turn to Page 6 and look at the table at the top of that page? I have a question or two for you there. Is it accurate to say that that table outlines the calculation of an adjusted call length for an Internet call as compared to a voice call?

A. Yes. What this table does is it takes all local calls and individually separates out ISP calls and the characteristics of that particular subset and then attempts to do the same calculation using those different characteristics of those two types of calls.

Q. Okay. So the voice call has a standard length of 3.3 minutes, and the ISP call has a standard call length of 20 minutes; is that correct?

A. Pursuant to this particular calculation, that's correct. One thing that I would sort of highlight in that is, although at the top of that table I noted it as voice calls, it's really all local calls minus Internet calls. There could very well be also local data applications and other types of calls in that group. I was a little bit probably sloppy in calling it simply voice calls.

Q. But the voice calls category does not include Internet

1 calls; correct?

2 A. Well, see, actually that's another point. It does
3 because where I pulled these numbers was directly from
4 BellSouth's cost studies, and my understanding was that
5 what BellSouth had done within its cost studies was it
6 had taken all local calls or calls it, at that time,
7 considered to be local, which included Internet calls,
8 and taken an average. I simply used those numbers and
9 then said, "Okay. We have some additional information
10 with respect to what an ISP call might look like by
11 itself." So I didn't really pull those out. I simply
12 took different characteristics from a different source
13 of what ISP calls might look like, and, because of
14 that, I think you can assume that, included in this
15 aggregate of what I've titled here as "Voice Calls,"
16 Internet service calls are also included in that.

17 Q. Okay. Well, let's cut to the chase on this, Mr.
18 Starkey. You would agree that your document has a
19 different call length between the voice calls and the
20 ISP, that is, 3.3 minutes versus 20 minutes; correct?

21 A. Yes, I would and, if you'll look at the source for the
22 20 minutes, that's an input. I assumed that. I didn't
23 have any real factual data with which to put that in.

24 Q. Okay. Given the table that you have constructed, the
25 costs, in fact, differ; do they not? If you look at

1 your table, costs per minute for voice call is \$.0043,
2 and the cost of a standard Internet call is \$.0048.; is
3 that correct?
4 A. Yes, those are the numbers that are included in the
5 table.
6 Q. Okay. Thank you. Mr. Starkey, are you aware of
7 whether or not ICG conducted any cost studies in this
8 docket?
9 A. They did not produce a cost study for ISP-bound
10 traffic.
11 Q. Without cost studies, can this Commission know whether
12 or not the reciprocal compensation rate that you
13 propose in this case covers ICG's costs?
14 A. Yes, I think they can. I think, at the very minimum,
15 they can make a learned opinion based upon that, and I
16 think one thing they can rely on in that respect is the
17 FCC's most recent Order, the UNE remand Order, that was
18 released on November 5, at Paragraph 260. The FCC has
19 basically said at Paragraph 260, and I'll just read it
20 - that probably makes more sense. At Paragraph 260, it
21 says, "When we examine the market as a whole, we find
22 that requesting carriers incur higher costs due to
23 their inability to realize economies of scale using
24 circuit switching equipment. We find that the scal-
25 ability of a switch mitigates but does not eliminate

1 the incumbent LEC's scale advantages and reduces but
2 does not eliminate competitor's sunk costs and entry
3 barriers." It then goes on to say, "For example,
4 competitor's switching costs per minute at a 10%
5 penetration level are slightly more than twice the cost
6 of an incumbent LEC serving the remaining 90% of
7 the market with its own switch. We find that, as a
8 general proposition, requesting carriers will incur a
9 materially greater cost when self-provisioning
10 switching at low penetration levels." I think what the
11 FCC is really saying there is that, if you rely on Rule
12 51.711 in its rules which says that the CLEC can use
13 the ILEC's costs in order to set a reciprocal
14 compensation rate, then certainly you know that they're
15 not overrecovering based on that rate, and I think,
16 pursuant to what they've said in the UNE Remand Order,
17 you can assume that they're probably not recovering
18 their costs associated with that. They've given the
19 CLECs, in, I believe, Rule 51.387, the opportunity to
20 file a cost study if they want to charge more than the
21 ILEC's rates. ICG hasn't done that, but certainly I
22 think the proposition that ICG would be overrecovering
23 at BellSouth's rates everything indicates that that
24 wouldn't be the case.

25 Q. Mr. Starkey, you're here on behalf of ICG presenting

1 economic testimony; is that accurate?

2 A. Yes, to some extent. I would suggest also policy
3 related testimony.

4 Q. Okay. But, in the context of economic testimony and
5 holding yourself forth with the economic background
6 that you have, can you assure this Commission that ICG
7 would not be receiving a windfall if it is awarded the
8 reciprocal compensation that it requests without
9 specific cost studies in the record?

10 A. I guess you and I could quibble about the word
11 "windfall" and what that means, but, to cut through
12 that, I think all indications are that ICG would not be
13 overrecovering and would likely be underrecovering
14 based on BellSouth's reciprocal compensation rate.

15 Q. I'm sorry. Can you help me understand; is that a yes
16 or a no?

17 A. That is - well, I don't know that it's either. It's an
18 answer more specific to your question, I think.

19 Q. Are you saying that that question is incapable of being
20 answered with a yes or a no?

21 A. Maybe, if I could hear it again, I'll try again.

22 Q. Okay. Okay. I simply want to know that, in your
23 context as putting forth economic testimony, can you
24 assure this Commission that, without cost studies in
25 the record, that ICG - can you assure this Commission

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that ICG is not receiving a windfall through the payment of the reciprocal compensation rate that you espouse?

MR. KRAMER:

Madam Chairman, I'm going to object. The witness did do his best to give a serious answer to the question. It was not an evasive answer, and I don't think it's fair to give him a question with words like "windfall" and expect him to answer yes or no when he has tried his best to give a serious answer to the question.

CHAIRWOMAN HELTON:

Mr. Starkey, I do believe he asked you, and you said you could quibble about the word "windfall." I would like to know. Can you give any assurance that there's not going to be a big end balance?

A. I can give an assurance that there won't be a big end balance. I think I would preface that, though, by saying that all cost studies are estimates. I mean, there's no way to get around that. Nobody could sit on the stand and say, "Here's my cost study. I give you 100 percent assurance that what is in here is a complete, total, accurate representation." It's the best we can do. My answer to Mr. Kitchings was an attempt on my part to say, yes, I think the FCC has

1 given us good reasons why ICG's costs are more than
2 BellSouth's; hence, that, if ICG relies on BellSouth's
3 costs, there is a tremendous possibility, and it's
4 likely to be the case, that ICG will not only not
5 overrecover but that it won't recover its actual costs.

6 MR. KITCHINGS:

7 Thank you, Chairman Helton.

8 Q. Mr. Starkey, would you agree with me that the
9 reciprocal compensation rate is an average rate for
10 local traffic?

11 A. Yes, it is.

12 Q. Okay. Now, do we know, Mr. Starkey, if the fees that
13 ICG charges to its ISP customers are sufficient to
14 cover its costs, again, without cost studies in the
15 record?

16 A. Not entirely. Not entirely. The only reason I would
17 preface the answer to that question is we would have to
18 be more specific as to what costs they were meant to
19 recover, maybe a marginal cost or an incremental cost.
20 I think we can be fairly well assured that they're
21 recovering their marginal cost, because it makes no
22 sense for ICG to provision services below its marginal
23 cost absent any market power. Whether they would
24 recover some type of costs in order to make them a
25 profitable company, obviously, I think Ms. Schonhaut

1 will testify that they're not profitable at this point
2 in time because of enormous sunk costs that are
3 necessary to compete in telecommunications, but I
4 think, as a general matter, we could agree and be
5 fairly assured that they are recovering their marginal
6 costs.

7 Q. Are you aware of any evidence in the record that ICG
8 has put in, either through your testimony or any of the
9 other witnesses, which would support the notion that
10 ICG's charges to its ISP customers cover its costs?

11 A. I don't know that there's any data in the record in
12 that respect. I was simply providing you that they
13 simply have no incentive not to. They would be working
14 against their own best interest to provide lower rates
15 than what their marginal costs would bear.

16 Q. As a matter of policy, should ICG recover more than its
17 costs through the payment of reciprocal compensation?

18 A. No, it shouldn't. Reciprocal compensation rates, in
19 order for symmetrical reciprocal compensation rates to
20 work effectively, they should be based on the costs of
21 the carriers.

22 MR. KITCHINGS:

23 Chairman Helton, I only have one more line of
24 questions for this witness, and I did not do so
25 earlier. I would request that the testimony that

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Mr. Starkey filed in North Carolina, which I presented as an Exhibit, be admitted into the record.

CHAIRWOMAN HELTON:

So ordered.

MR. KITCHINGS:

Thank you.

STARKEY CROSS EXHIBIT 1

Q. Mr. Starkey, on Pages 7 and 8 of your rebuttal testimony, you refer to states which have ordered that reciprocal compensation for ISP-bound traffic and have ruled in the way that you request in this hearing; is that accurate?

A. That's fair.

MR. KRAMER:

I'm sorry. Could you just give me a moment to get that?

MR. KITCHINGS:

Sure.

MR. KRAMER:

Thank you.

MR. KITCHINGS:

Uh-huh.

Q. Can you tell the Commission how many of those decisions you refer to were arbitrations for new interconnection

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agreements?

A. Yes. There have currently been eight states that have reached the merits of reciprocal compensation in an arbitration since the Declaratory Ruling which was February of this year.

Q. Okay. So that's eight of the fifteen or sixteen that you refer to on those two pages?

A. Well, obviously, we're shooting at a moving target here because arbitrations are ongoing . . .

Q. Sure.

A. I'm relying, I guess, on more recent information. Actually, I think there have been, at this point, 25 states that have issued a decision since the Declaratory Ruling. Eight of those were in arbitrations.

Q. Okay. So that leaves 17, by my calculation, but I wasn't very good at math. That's why I went to law school. Those 17, those would have been in the context of interpreting contracts and what the parties intended; is that correct?

A. I think largely we could agree to that. Though, if you read through the decision, some of them make more broadly based policy arguments than that and suggest that, on a going-forward basis, that will also be their finding. It's simply that it wasn't brought to the

1 Commission in an arbitration. That's why I sort of
2 separate those, but I think other of those states - and
3 I'm thinking of West Virginia, particularly - the case
4 was brought to the Commission via a complaint, but the
5 Commission decided a very broad policy question of ISP-
6 bound traffic is and should be subject to reciprocal
7 compensation, and it does so on a going-forward basis.

8 Q. Can we agree, sir, though, generally there is a
9 difference between looking at a contract that two
10 parties had entered into and the intent of those
11 parties versus setting policy on a going-forward basis?

12 A. Yeah, I think we could agree that the intent is the
13 issue in the first round, and the policy is more the
14 issue in the second.

15 Q. Okay. Okay. That's fair. Did the number that you
16 referenced, which is now 25, does that number include
17 the result of the BellSouth/DeltaCom arbitration in
18 South Carolina?

19 A. Yes, it does.

20 Q. And did you participate in that proceeding on behalf of
21 DeltaCom, Mr. Starkey?

22 A. Yes, I did. As I was looking through this list, I've
23 actually participated in five of the eight that have
24 been decided in arbitration since February, and South
25 Carolina was one of those.

1 Q. Okay. And was your position, in essence, the same that
2 you take here; that is, that reciprocal compensation is
3 due for ISP traffic?
4 A. Yes, that was the position in South Carolina.
5 Q. Okay. Do you know what the result of the South
6 Carolina DeltaCom/BellSouth arbitration was?
7 A. South Carolina is the only of those eight states to
8 determine in an arbitration that they disagreed with
9 our position.
10 Q. Okay. So, to round that out, South Carolina did not
11 agree with the position that you advocate; is that
12 correct?
13 A. That's right. They were the only state not to in the
14 arbitration.
15 Q. Okay. Now, we've spoken about the difference between
16 these two sorts of cases, but, in a complaint case
17 setting, are you familiar with a decision out of
18 Louisiana which dealt with a complaint case between a
19 company called KMC and BellSouth?
20 A. Yes, I am aware of that.
21 Q. Okay. Now, we've talked about this one before. I
22 would like to read to you a portion of the findings
23 there and ask you, as a matter of good public policy,
24 would you agree with allowing a CLEC to do what is
25 found here.

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A. Okay.

Q. "KMC generated approximately \$636,427 in revenue from providing service to its ten Louisiana ISP customers during the same time period that it billed BellSouth \$2,160,985 in reciprocal compensation traffic for those ten ISP customers." Mr. Starkey, do you believe it represents good, sound public policy and economic reasoning to allow a CLEC to obtain more in revenue from BellSouth than from its end-user customers?

A. And, as I've answered this question in the past, I don't think you can derive good, sound economic or public policy from that simple comparison. What I've suggested is that - what this Louisiana case really is, is KMC had a number of ISP providers. BellSouth had a number of customers that were calling those ISP providers. BellSouth, the reciprocal compensation was paying, I guess, about \$2.16 million to KMC to carry its customers' traffic to those ISPs. Even though KMC may have only been getting \$636,000 roughly from its ISPs, what you have to remember is those ISPs were actually receiving calls, and I think I did the math based on some of Mr. Varner's calculations in Georgia, from somewhere between 25,000 and 30,000 BellSouth local customers. So, if you asked the question, is it reasonable for KMC to recover \$2.16 million for

1 providing service to some 35,000 or 40,000 BellSouth
2 customers, I think the answer to that question is it
3 very well could be, and, if the rate of the reciprocal
4 compensation was based on BellSouth's costs, then, yes,
5 it would be.

6 Q. Okay. That's fair. I would also read to you one other
7 quote . . .

8 A. Okay.

9 Q. . . . near the end of that Order from Pages 20 and 21,
10 the Commission stated, "Indeed, in this particular
11 case, KMC billed BST reciprocal compensation for ISP
12 traffic that was approximately 340 percent more than
13 KMC received in revenue from providing actual service
14 to its ten ISP customers in Louisiana. The negative
15 impact on competition in the local market as well as
16 the potential for abusing the reciprocal compensation
17 obligation from permitting such arrangements are
18 obvious." Is it fair to say, Mr. Starkey, that you
19 would disagree with the Louisiana Public Service
20 Commission on that point?

21 A. There's a number of things I would disagree with the
22 Louisiana Public Service Commission about on that
23 point. The first one being they used the word that KMC
24 provided actual service to the ISPs, indicating that
25 they didn't provide actual service to the 35,000 or

1 40,000 BellSouth customers that were calling those
2 ISPs. Those BellSouth customers wouldn't have been
3 able to get to their ISP without KMC. I would suggest
4 that KMC was providing actual service to those
5 customers as well, and I think the same answer that I
6 gave earlier is responsive to this as well, which is,
7 whenever you see the fact that KMC was providing that
8 kind of service to that many customers, the \$2.16
9 million isn't that out of line necessarily. I mean,
10 again, you would have to look at their underlying
11 costs, but, assuming that the rate of reciprocal
12 compensation is based on BellSouth's costs, I don't
13 think that that is necessarily economically inefficient
14 or shows bad public policy. The Louisiana Commission
15 does agree, but I disagree with their finding; yes.

16 Q. So you would disagree with their finding, in essence?

17 A. Yes, I would.

18 Q. Okay. Now, finally, Mr. Starkey, you discuss the
19 concept of cost causation in your testimony; don't you?

20 A. In response to Dr. Taylor, I do.

21 Q. Okay. Is it fair to say that your position is that the
22 cost of making ISP-bound calls should be pushed back as
23 closely as possible to the cost causer?

24 A. Yes, I think those are the words I use in my testimony,
25 and, by that, I mean that economic decision-making

1 requires that, whenever you generate costs, and let's
2 use the network, whenever I generate cost as a caller
3 on the network, the rates I pay should reflect the cost
4 I cause to me so that I can make rational economic
5 decision-making. In my testimony when I say that the
6 costs should be pushed back as close to the cost causer
7 as possible, I mean for that intention so that they can
8 recognize the costs it is that they cause.

9 Q. Okay. I'll ask you a hypothetical, Mr. Starkey.

10 A. Okay.

11 Q. If it were demonstrated in Kentucky that BellSouth was
12 not covering its costs in providing local service to
13 its customers and reciprocal compensation is awarded to
14 ICG in this case, would you be in favor of raising
15 local rates to those customers as cost causers?

16 A. I would have to know several bits more of information
17 before I could answer yes or no to that. The first
18 thing we would need to talk about is - BellSouth's
19 local rates, it's my understanding, if they're done
20 like pretty much everywhere else in the country, are
21 based on averages across particular customer groups,
22 residential or business. If BellSouth were, one,
23 losing money on all residential customers or all
24 business customers or all local customers because of
25 reciprocal compensation and BellSouth came in, through

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a rate case or however it wished to pursue such a thing with the Commission, and it was found that they were not entering a return on their rate base, then, you know, I think it's traditional public policy and regulatory policy that they should be allowed to recover those revenues. However, to take a particular type of service, and let's say calls bound for the Internet, and say that those particular services don't allow BellSouth to recover revenues on that given service, that's the single issue ratemaking issue that both the RBOCs and the Commissions have really sort of avoided in the past, you know, like it was the plague, because what they really do is look at the entire BellSouth business entity as a whole in determining what rates are appropriate in terms of public policy.

Q. Well, averages are fairly common throughout the use of telecommunications pricing and costing; aren't they? There's nothing unusual about that; is there?

A. Well, they are, though. Competition is certainly putting pressure on those averages.

MR. KITCHINGS:

Okay. I don't have anything further. Thank you, Mr. Starkey. Thank you, Chairman Helton.

CHAIRWOMAN HELTON:

Ms. Dougherty?

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MS. DOUGHERTY:

No questions. Thank you.

CHAIRWOMAN HELTON:

Redirect?

MR. KRAMER:

Thank you, Madam Chairman.

REDIRECT EXAMINATION

BY MR. KRAMER:

Q. Mr. Starkey, Mr. Kitchings asked you several questions about your Exhibit 2, a diagram contained in Exhibit 2, your simplified model. Could there also be a tandem switch involved in the interconnection between the two parties?

A. Yes.

MR. KITCHINGS:

I object, Chairman Helton. I asked nothing about a tandem switch. It doesn't seem to me that that's appropriate redirect.

CHAIRWOMAN HELTON:

But you did ask about the diagram, and he's asking about the diagram. So, Mr. Kramer, proceed.

Q. There could also be a tandem switch involved; isn't that correct?

A. Yes, and it's likely that there would be one.

1 MR. KRAMER:
2 Okay. That's the only question I had on that,
3 Madam Chairman. I just was . . .
4 CHAIRWOMAN HELTON:
5 Any recross?
6 MR. KRAMER:
7 I'm sorry, on that issue.
8 CHAIRWOMAN HELTON:
9 Oh, I'm sorry.
10 MR. KRAMER:
11 I have other questions. I just meant on that one
12 point so it wasn't going to get contentious. I
13 was just trying . . .
14 Q. Now, Mr. Starkey, Mr. Kitchings also asked you about
15 the North Carolina supplemental testimony; do you
16 remember that?
17 A. Yes, I do.
18 MR. KRAMER:
19 Madam Chairman, may I approach the witness for a
20 moment?
21 CHAIRWOMAN HELTON:
22 Yes.
23 MR. KRAMER:
24 Unfortunately, I only have one copy of this.
25 It's marked up.

1 Q. I am handing the witness a copy of the decision of the
2 North Carolina Utilities Commission in the arbitration
3 proceeding in which the testimony that Mr. Kitchings
4 referred to was an Exhibit, and I'm going to ask, Mr.
5 Starkey, if you will, will you please read from the
6 bottom of Page 6 and the top of Page 7?

7 A. Yes. "The Commission commends ICG and BellSouth for
8 their efforts in presenting interim proposals for ISP
9 compensation in response to the Commission's June 16,
10 1999, Order Concerning Interim Proposals for
11 Compensation in which the Commission asked the parties
12 for 'creative thinking' concerning interim prospective
13 compensation mechanisms for ISP traffic, which would be
14 subject to true-up. Of the proposals received from the
15 parties, the Commission believes that ICG's proposal,
16 which is based on UNE rates, has the greater merit."
17 Is that far enough?

18 Q. Was the proposal that the Commission was referring to
19 the supplemental creative thinking?

20 A. No, it wasn't. I think that's what they were referring
21 to when they said thanks for the proposals, but what
22 they eventually adopted was our proposal, the same
23 proposal that we are proposing here, which is to use
24 BellSouth's reciprocal compensation rate for tandem
25 interconnection.

1 Q. Now, Mr. Kitchings also asked you about the assumption
2 that you made regarding different call lengths; do you
3 remember that?
4 A. Yes.
5 Q. And he also pointed out that, based on that assumption,
6 the cost of an Internet call was lower; do you recall
7 that?
8 A. Yes.
9 Q. Okay. The cost per minute -excuse me - of an Internet
10 call was lower?
11 A. Yeah, that's an important distinction.
12 Q. Now, Mr. Starkey, would a 20 minute call to the
13 Internet and a 20 minute conventional circuit-switched
14 voice traffic call, local call, between two end users
15 have any difference in cost characteristics assuming
16 equal transport was involved in both sets of calls and
17 both calls traversed the same switches?
18 A. Yes, they would have exactly the same costs and that's
19 an important distinction to make, is the fact that,
20 whenever I said earlier that the 20 minutes for an
21 Internet call was an input, I'm afraid what can be
22 misleading about this is the fact that there isn't a
23 distinction between the cost of a voice call and a call
24 to the Internet. There may be some distinction in the
25 fact that ISP-bound calls might be longer in nature but

1 that's really a distinction between long calls versus
2 short calls. There are long voice calls, longer than
3 the average Internet call, that would cost exactly the
4 same as an equally timed Internet call. Again, they
5 use the same facilities, the same functions, of the
6 network. I think it's just important to point out that
7 what we're really talking about in this North Carolina
8 testimony is a distinction between very short calls and
9 long calls; not a distinction between voice traffic or
10 local traffic and then ISP traffic.

11 Q. Mr. Starkey, you and Mr. Kitchings also had a
12 discussion about whether, on your Diagram 2, there
13 shouldn't have been an extension on the terminating
14 side of the call to show that the call was going on to
15 the Internet; do you recall that?

16 A. Yes.

17 Q. Is what's at issue here what happens to a call once
18 it's on the Internet or the costs that are incurred
19 while it's on the networks of the two parties that are
20 involved?

21 A. The costs that are at issue here are the costs of the
22 networks of BellSouth and ICG; not the costs of the
23 call or the characteristics of the call after it
24 reaches the ISP server.

25 Q. Okay.

1 A. That's why I included just those facilities.
2 Q. Now, you were also asked some questions about cost
3 studies. Do you know if ICG did a cost study to
4 support the reciprocal compensation rate it is seeking
5 for circuit-switched voice traffic calls?
6 A. No, it did not.
7 Q. Do you know if BellSouth is contesting the rate that
8 ICG is seeking for circuit-switched voice calls?
9 A. It's my understanding that they are not and that's an
10 important point, is the fact that we've already kind of
11 established in the testimony in here today that the
12 costs of a call, whether that be toward the Internet or
13 for a local voice call, are the same. To suggest that
14 a cost study must be done for one and not the other
15 somewhat misses the point that the cost wouldn't be any
16 different.
17 Q. And so, if I asked you the same question that Mr.
18 Kitchings asked you, and I'm paraphrasing, can you
19 assure this Commission that ICG won't get a windfall
20 for circuit-switched voice traffic in the absence of a
21 cost study, would your answer be the same?
22 A. Yes, it would be.
23 MR. KRAMER:
24 I have nothing further.
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CHAIRWOMAN HELTON:

Recross?

MR. KITCHINGS:

Thank you, Chairman Helton.

RECROSS EXAMINATION

BY MR. KITCHINGS:

Q. Mr. Starkey, your counsel asked you about the North Carolina Order; do you recall that?

A. Yes.

Q. Can we agree that the North Carolina Order, in ordering reciprocal comp, made that subject to a true-up to such time as the FCC has ruled?

A. I need to look at it to be as specific to that.

MR. KITCHINGS:

May I approach the witness, Chairman Helton?

CHAIRWOMAN HELTON:

Yes.

MR. KITCHINGS:

Thank you.

A. I do remember there's a true-up provision.

Q. Mr. Starkey, we can go into further detail, if necessary, but I would direct your attention to ordering Paragraph 1 of Page 17, which I've handed you, which I purport to be the North Carolina Utilities Commission Order.

1 A. Okay. If you don't mind, I'll just read that and that
2 way we'll all know what it says.

3 Q. Please.

4 A. "That the parties shall, as an interim inter-carrier
5 compensation mechanism, pay reciprocal compensation for
6 dial-up calls to ISPs at the rate the parties have
7 agreed upon for reciprocal compensation for local
8 traffic and as finally determined by this Order,
9 subject to true-up at such time as the Commission has
10 ruled pursuant to future FCC consideration of this
11 matter." That was what I was trying to remember, is
12 that it's really subject to the North Carolina
13 Commission ruling on the FCC whenever it makes a
14 determination.

15 Q. But, again, it is subject to a true-up?

16 A. Yes, sir, there is a true-up mechanism.

17 MR. KITCHINGS:

18 Thank you. Thank you, Chairman Helton. I don't
19 have anything further.

20 CHAIRWOMAN HELTON:

21 You may be excused.

22 A. Thank you.

23 MR. MERSHON:

24 Madam Chairman, I think we don't have a lot of
25 questions for this next witness, if you wanted to

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do it before lunch, but it's up to you.

CHAIRWOMAN HELTON:

Let's get started, then. Next witness?

MR. KRAMER:

Madam Chairman, we would be happy to provide a clean copy of the North Carolina decision for the record and to the staff and Commissioners. We'll get that to you early next week or maybe even today.

CHAIRWOMAN HELTON:

Thank you. We'll order it into the record.

MR. KRAMER:

Thank you.

CHAIRWOMAN HELTON:

Thank you.

MR. KRAMER:

At this time, ICG calls Cindy Schonhaut.

WITNESS SWORN

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proceeding the rebuttal testimony of Cindy Schonhaut consisting of 17 pages?

A. Yes.

Q. And was each of these testimonies prepared by you or under your supervision?

A. Yes.

Q. Do you have any corrections to your testimony?

A. Yes, I have a couple of corrections. In my direct testimony on Page 3, the first question which the answer is on Lines 3, 4, and 5, the list of states where I've testified before includes the State of Colorado. Actually, it's mentioned twice, and I would like to delete both references and add the State of Illinois. In my rebuttal testimony on Page 14, the last line on the page, Line 23, where it says "the Commission," I would like to change the word "the" to "this." Those are my only corrections.

Q. As corrected, Ms. Schonhaut, if I asked you each of the questions contained in your direct and rebuttal testimonies, would your answers to those questions be the same?

A. Yes.

Q. Thank you.

MR. KRAMER:

Madam Chairman, at this time, I would like to move

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Ms. Schonhaut's testimony into the record. I would also request permission of the Chair to ask Ms. Schonhaut a couple of direct questions that are necessary to correct the record in this proceeding.

CHAIRWOMAN HELTON:

Okay.

Q. Ms. Schonhaut, were you here for the testimony of Mr. Holdridge?

A. Yes.

Q. Are you qualified to correct the testimony of Mr. Holdridge?

A. Yes.

Q. And what is the basis of your ability to correct the testimony of Mr. Holdridge?

A. I'm a senior executive officer of the company, and I often have more accurate and current information than the people that work for me in the company. So I would like to correct, for the record, certain factual pieces of information that I think should stand as corrected so they would be accurate.

Q. All right. Would you please give the areas of correction?

A. Yes, I would. First, ICG does serve residential customers in Kentucky, and this is a correction not

1 only to Mr. Holdridge's testimony, but I checked . . .

2 CHAIRWOMAN HELTON:

3 Ms. Schonhaut, just a minute.

4 A. Okay.

5 CHAIRWOMAN HELTON:

6 Mr. Kramer, could you ask specific questions so
7 that we don't get into a long discussion?

8 A. Okay.

9 MR. KRAMER:

10 I will do that.

11 A. Excuse me.

12 MR. KRAMER:

13 Yes.

14 Q. Ms. Schonhaut, does ICG serve residential customers in
15 Kentucky?

16 A. Yes, we do. The correction is - I wanted to add that
17 it's not only to Mr. Holdridge's testimony but
18 BellSouth's Interrogatory No. 9 to ICG was essentially
19 the same question. So I want to correct that as well.

20 Q. Okay. And, Ms. Schonhaut, is it accurate that the
21 Alabama settlement was part of a settlement regarding
22 other issues? I'm sorry. May I withdraw that and
23 rephrase? Was the performance standards issued in the
24 Alabama proceeding withdrawn as a part of a settlement
25 of other issues?

1 A. No, it wasn't withdrawn as a settlement. ICG withdrew
2 its testimony regarding the issue of performance
3 measures in Alabama by just our own voluntary choice.
4 It wasn't part of a settlement.
5 Q. All right. Ms. Schonhaut, is it the company's position
6 that BellSouth has a current obligation to combine new
7 unbundled network elements?
8 A. No. We believe that BellSouth, at this time, has no
9 such current obligation.
10 Q. Are we asking the Kentucky Commission to require
11 BellSouth to combine currently uncombined elements?
12 A. Yes, we are.
13 Q. And is that a step that goes beyond where the FCC went?
14 A. Yes, it's a step beyond what the FCC did, but the FCC
15 expressly allowed for such a step.
16 Q. We'll have an opportunity.
17 MR. KRAMER:
18 Thank you, Madam Chairman. Nothing further.
19 CHAIRWOMAN HELTON:
20 She's tendered for cross?
21 MR. KRAMER:
22 Yes, I'm sorry. She's tendered for cross, and, at
23 this time - I'm not sure you ruled on the
24 admission of her testimony.
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CHAIRWOMAN HELTON:

Her testimony is so ordered into the record.

MR. KRAMER:

Thank you.

CHAIRWOMAN HELTON:

Mr. Kitchings?

MR. KITCHINGS:

Thank you, Chairman Helton.

CROSS EXAMINATION

BY MR. KITCHINGS:

Q. Good morning, Ms. Schonhaut.

A. Good morning.

Q. A couple of follow-up questions to your counsel's direct questions. Did I understand you to say that, in fact, ICG does serve residential customers in the State of Kentucky?

A. Yes, we do.

Q. Can you say whether that is through facilities-based competition, resale, or the purchase of UNES?

A. It's through resale.

Q. Through resale. Exclusively?

A. Yes. All of the residential customers we serve we reach by reselling BellSouth's services; yes.

Q. Okay. Can you state how many residential customers ICG serves in the State of Kentucky?

1 A. I don't actually know that number. What I can tell you
2 is most of them are employees of ICG; not all but the
3 majority of them are.

4 Q. Can you provide us, through a late-filed Data Request,
5 a correction to the Data Request which we asked earlier
6 which states that no customers are residential in
7 Kentucky?

8 A. Yes, we will.

9 Q. Okay. Thank you. Are they confined, Ms. Schonhaut, to
10 one area of Kentucky or is it spread throughout the
11 state?

12 A. I believe it's mostly in the same area where we provide
13 facilities-based service to business customers, that
14 is, the Greater Louisville Area.

15 Q. But, again, it is through resale as opposed to
16 facilities-based?

17 A. Yes. Yes.

18 Q. Okay. Now, a couple of questions, then, about your
19 business plan here in Kentucky, Ms. Schonhaut. Do you
20 have a copy of your testimony handy?

21 A. Yes, I do.

22 Q. I've got a couple of citations for you that I would
23 like you to turn to and then read those sentences in
24 sequence.

25 A. Is this direct? Excuse me. Is this direct or . . .

1 Q. There will be a couple of direct, and then one out of
2 your rebuttal. So you'll need copies of both.

3 A. Okay. I have both. I just wanted to go to the
4 appropriate one.

5 Q. Okay. The first citation I would cite you to is on
6 Page 6, Lines 11 through 13. I would ask you to read
7 that to the Commission, please.

8 A. Page 6. I've got it. "In addition, with reciprocal
9 compensation for calls to ISPs precluded as a source of
10 revenue, ICG would find it necessary to weigh whether
11 it would be a wise business decision to expand its
12 investment and provide increased services in Kentucky."
13 That's it?

14 Q. Okay. That's it; yes, ma'am. Please turn to Page 10.

15 A. Yes.

16 Q. Beginning at the very end of Line 12 with the word
17 "Without . . .," if you would read that sentence,
18 please.

19 A. "Without compensation for ICG's costs in serving a
20 significant category of its customers, ICG could be
21 forced to re-think its options concerning its
22 operations in this state."

23 Q. Okay. And, finally, Ms. Schonhaut, I would direct you
24 to your rebuttal testimony, Page 4, Lines 14 through
25 16.

1 A. Yes. Do you want me to read that sentence?
2 Q. Please.
3 A. "If reciprocal compensation for calls to ISPs were
4 foreclosed as a source of revenue for several months or
5 more, ICG would be forced to re-think its options
6 concerning its further investment in this state."
7 Q. Okay. Now, with those three sentences that you've just
8 read as background, is ICG saying that, if it does not
9 receive a reciprocal compensation award in this docket,
10 that it is going to cease competing in the State of
11 Kentucky?
12 A. Absolutely not.
13 Q. Okay. Hypothetically, Ms. Schonhaut, if the FCC
14 concludes, in its Notice of Proposed Rulemaking, not to
15 award reciprocal compensation for calls to ISPs, will
16 ICG's business decision to provide service in Kentucky
17 also - same question. Will you remove your business
18 from Kentucky?
19 A. Absolutely not, and I think the three sentences that we
20 read together clearly say that we would take, under
21 advisement, into consideration the fact that there's no
22 reciprocal compensation in this state. We would not
23 remove the current facilities that we provide service
24 to - that we have in place or the customers we provide
25 service to. We would be rethinking, and the word is

1 "our further investment," future options for expansion,
2 facilities, UNEs, or resale, whatever. That's a normal
3 evaluation through a business planning process.
4 Q. Okay. Now, in your rebuttal testimony on Page 10, you
5 refer to the Alabama and North Carolina Commission
6 decisions, and were you here earlier when counsel was
7 talking with Mr. Starkey about the North Carolina
8 decision?
9 A. Yes, I was.
10 Q. Can we agree that, in both the North Carolina Order and
11 the Alabama Order, the Commissions there determined
12 that the payment of reciprocal compensation would be
13 subject to true-up?
14 A. Actually, I don't agree with the way you said that, if
15 I may explain . . .
16 Q. Please.
17 A. What both Commissions said is that the rate is subject
18 to true-up, that is, that reciprocal compensation will
19 apply to ISP traffic, and that is not going to be
20 revisited or somehow trued up through the term of the
21 interconnection agreement. What the Alabama Commission
22 said, which is an effective Order, and the North
23 Carolina is in pending effectiveness, the Alabama
24 Commission said specifically they're establishing a
25 rate for reciprocal compensation. If the FCC after

1 that changes the rate, the new rate that the FCC would
2 impose would be what is trued up to. So it's not the
3 issue of whether ISP traffic is subject to reciprocal
4 compensation.

5 Q. Well, hypothetically, Ms. Schonhaut, if the FCC were to
6 determine that this type of traffic was best served
7 through bill-and-keep or, alternatively, that it was to
8 be through a zero rate, would not those Orders require
9 that any monies paid between the parties be returned,
10 because the rate would, in effect, be zero?

11 A. I actually believe that the answer to that is no for
12 Alabama, and I'll explain why. I was present at the
13 Commission's open meeting in Alabama where this
14 particular provision was discussed at length, and what
15 the Commission's assumption was, was that the FCC is
16 going to perhaps change the rate structure of
17 reciprocal compensation, for example, from a per minute
18 of use rate to a flat capacity-based charge, in which
19 case, the Alabama Commission said, "Well, we should
20 have that new rate structure implemented as if it was
21 on the first date of the interconnection agreement."
22 So, in a sense, yes, there could be a change. If you
23 were to tell me - your hypothetical included a few
24 things. For example, you said "bill-and-keep." If the
25 FCC were to say, down the road, that bill-and-keep is

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the appropriate mechanism for recovery of reciprocal compensation costs, I think that that would be unclear whether that would be sort of trued up back to the first date of the agreement, and, because it would be unclear, I think that would be litigated.

Q. You're an attorney by training; are you not?

A. Yes, I am.

Q. And you would agree with me that the final Order of a Commission is, to use layman's terms, the final word out of the Commission; correct? I mean, it would supersede any discussions that were held in an open meeting at the Commission for legal purposes?

A. Oh, that's true, but the specific language of the Alabama decision itself, the written effective Order, specifically mentions retroactively trued up to the level of intercarrier compensation ultimately adopted by the FCC.

Q. Okay.

MR. KITCHINGS:

Chairman Helton, we would request that the Alabama Order be allowed as a late-filed Exhibit. The Order speaks for itself, but we would like for the Commission to have the opportunity of that just as we've done with the North Carolina Order.

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CHAIRWOMAN HELTON:

So ordered.

Q. Ms. Schonhaut, however, do you have a copy of that Alabama Order?

A. Oh, yes, I do.

Q. Could I ask you just to read one paragraph? Then we'll be through. I would turn your attention to Page 19 of the Order.

A. Yes.

Q. Under the subheading "Findings and Conclusions," of the Commission as to Issue No. 1, . . .

A. Yes.

Q. . . . there is a paragraph that begins on Page 19 and carries over to Page 20 . . .

A. Yes.

Q. . . . and starts off "In order . . ." Would you just read that paragraph, please?

A. That paragraph follows the sentence I just read. "In order to prepare for the eventuality of a 'true-up' of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the FCC issues

1 its anticipated federal rule governing inter-carrier
2 compensation for ISP-bound traffic and said rule
3 becomes effective, that rule will prospectively govern
4 the compensation to be paid by the parties to this
5 proceeding for ISP-bound traffic. Similarly, the
6 compensation ordered to be paid in this proceeding for
7 ISP-bound traffic will be retroactively 'trued-up' to
8 the FCC mechanism from the effective date of the
9 interconnection agreement that results from this
10 Arbitration. If through that retroactive 'true-up'
11 process any funds are found to be owing by one party to
12 the other, the party owing such funds shall submit them
13 to the opposite party within thirty (30) days of the
14 completion of the 'true-up' process."

15 MR. KITCHINGS:

16 Thank you, Ms. Schonhaut. Thank you, Chairman
17 Helton. I don't have anything further of this
18 witness.

19 MS. DOUGHERTY:

20 No questions, Your Honor.

21 CHAIRWOMAN HELTON:

22 Thank you. Redirect?

23 MR. KRAMER:

24 Thank you.

25

1 REDIRECT EXAMINATION

2 BY MR. KRAMER:

3 Q. Ms. Schonhaut, we've had a discussion on the
4 residential customers that ICG serves in Kentucky. Is
5 there a reason that that offering is primarily
6 employees?

7 A. Yes. The reason is that, because we provide those
8 residential services through resale, it is a losing
9 service, that is, with respect to financials. We lose
10 money providing that service. ICG generally, like most
11 telecom companies, provides some telecom services at a
12 subsidized rate to the employees as a human resources
13 benefit. That's common in the industry. So, where we
14 lose money on providing the service to employees, we
15 don't mind. However, if the customer, the residential
16 customer, is not an employee, then we need to approach
17 it as a business, and, through resale, there is no
18 opportunity for us to recoup our costs and make a
19 reasonable profit.

20 Q. Ms. Schonhaut, you also had a discussion with Mr.
21 Kitchings about the true-up provisions. Do you recall
22 that?

23 A. In Alabama and at North Carolina; yes.

24 Q. In Alabama and North Carolina?

25 A. I'm asking you, if you know, whether, as a matter of

1 general common law, it is automatic that there is a
2 refund when there is a change of rates? There is a
3 refund - I might withdraw and try it again.

4 A. Could you also speak a little louder, please?

5 Q. I'm sorry. Do you know, generally, whether there is
6 automatically a true-up when there has been something
7 like an accounting order pursuant to which an agency
8 has asked parties to keep track of the transactions
9 between them, or is there often discretion exercised to
10 determine whether there is, in fact, a true-up in
11 refund?

12 A. Yes, that's actually true. I mean, there is generally,
13 in the common law and there has been for a long time, a
14 principle, a rule of law, against what's called
15 retroactive ratemaking; that is, you can't go
16 backwards. However, when a Commission institutes a
17 true-up, that obviously is in advance, sort of
18 announcing that there may be retroactive ratemaking, so
19 to speak, and that's why you have an accounting
20 requirement, "Keep track of this money in case we later
21 need to know how much is owing which way or the other,"
22 but, when Commissions do that, at that point in time,
23 when the true-up would be implemented, they consider
24 various factors, including equities, the relative
25 amount of money at issue, etc.

1 Q. Okay. Finally, Ms. Schonhaut, just one other little
2 area. You and Mr. Kitchings had a discussion about
3 several quotes, and Mr. Kitchings asked you if those
4 were a threat or - well, that ICG was going to withdraw
5 from doing business in Kentucky; do you recall that?

6 A. Yes.

7 Q. And you referred to the fact that ICG would do an
8 assessment in the event that happened at either the FCC
9 level or the Kentucky level. What kind of assessment
10 did you have in mind? What would be the thinking of
11 there?

12 A. Right. Well, we would do a business planning
13 evaluation, and sometimes I've called it numbers
14 crunching because, you know, that's what's behind a
15 business plan, the opportunity to compete, how much it
16 would cost you to do so, and what you could potentially
17 provide in terms of services, and, in addition to
18 considering any change, for example, that the FCC might
19 impose that would be reflected here in Kentucky, we
20 will also have to look at the fact that we have not
21 been paid yet in any BellSouth state by BellSouth for
22 monies already owed for recip comp that those State
23 Commissions have ordered to be paid. So we are
24 operating, not in a financial sense but in my lawyerly
25 terms, at a deficit there. So we are absolutely bound

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by our shareholders to consider the opportunity of whether or not we will be able to make any money, and those will be all considerations that will go into a mix including the fact that we've already made significant investment here, almost \$27 million and growing, which would weigh on staying and continuing to invest. When I said "staying," I don't mean to imply that we might go. It's just an issue of how much more we would expand here, how many more millions of dollars we would or wouldn't invest.

MR. KRAMER:

I have nothing further, Madam Chairman. Thank you, Ms. Schonhaut.

CHAIRWOMAN HELTON:

Anything else?

MR. KITCHINGS:

Just a couple of follow-ups, Chairman Helton.

RECROSS EXAMINATION

BY MR. KITCHINGS:

Q. Ms. Schonhaut, you stated in response to your counsel that you lose money when you resell services to your employees here in Kentucky; is that correct?

A. Residential service.

Q. Residential service.

A. Yes, I did say that.

1 Q. All right. Now, you purchase the services at a 15 or
2 16 percent discount off of BellSouth's rate; isn't that
3 correct?

4 A. Approximately, yes.

5 Q. Do you further discount those services to your
6 employees beyond that 15 or 16 percent?

7 A. I know that we do that generally as a benefit to our
8 employees. I can't tell you the exact differential
9 here in Kentucky, but generally it's a small
10 differential.

11 Q. Didn't you also say, though, that they're not just
12 employees that you serve; there are a few other
13 residential customers that you serve?

14 A. Yes, and I should clarify who those other customers
15 are. When we serve a business and, in particular, a
16 telecommunications intensive business, - a factory
17 might be an example, just to pick one example - often
18 what happens is we work through the officers of that
19 company to help provide service to them, and we find
20 that a lot of those executives in those companies don't
21 want Bell service at home any more. They're looking
22 for an alternative. So they would say to us, "We like
23 the service you're providing at our factory. I want
24 you to provide service at home. I don't want Bell any
25 more." We will provide the service to the President of

1 that company even though we lose money doing it,
2 because it's obviously, in the bigger picture, a very
3 good business decision to do so. So that's the type of
4 customer that falls into the category of nonemployees.
5 Q. Okay. But, to that President of that company, do you
6 discount his telephone service further than the 15 or
7 16 percent discount that you receive in reselling
8 BellSouth service?
9 A. We would charge that customer approximately what Bell
10 would charge, usually a small discount off of what Bell
11 would charge for the same service. I'm not sure if I
12 understood your question. I tried to answer it. I'm
13 sorry if that wasn't the question.
14 Q. Well, let's try it again, then. You offer service to a
15 President of a company that is not an employee;
16 correct, through resale?
17 A. For example, yes.
18 Q. For example, but through resale; correct?
19 A. Yes.
20 Q. And, in reselling BellSouth services, you get a 15 or
21 16 percent discount when you purchase those services
22 from BellSouth?
23 A. Right. Right. We buy it at a wholesale rate; yes.
24 Q. Correct. Do you discount that service further to the
25 President?

1 A. Oh, you mean from the wholesale rate?
2 Q. Yes.
3 A. I'm sorry. Okay. I didn't understand. No, we don't.
4 If we - no, we don't. I'll leave that as the answer.
5 Q. Okay. But your testimony here today is that you still
6 lose money irrespective of that fact in providing
7 service to that President?
8 A. We lose money . . .
9 Q. In providing residential service to that customer.
10 A. . . . in providing residential service. Yes, we do, on
11 the average to all the residential customers together.
12 Q. Well, I'm not asking on the average, . . .
13 A. Okay.
14 Q. . . . but I'm talking about that particular customer or
15 that . . .
16 A. Uh-huh.
17 Q. . . . group category of customers that are not
18 employees. Do you lose money to those customers that
19 you provide residential service to?
20 A. We do on the local service to residential customers.
21 Yes, we do.
22 Q. Irrespective of the fact that you purchase it at a
23 discount from BellSouth?
24 A. Yes. I mean, factoring that in, yes, we do, and the
25 reason is because, even though the discount seems - you

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know, 15 or 16 percent seems like you might be able to squeeze some profit or margin out of that, for just the local residential service, which is very low price in an absolute sense and in a relative sense as well, there's no opportunity to make money. There just isn't.

VICE CHAIRMAN HOLMES:

Ms. Schonhaut, . . .

A. Uh-huh.

VICE CHAIRMAN HOLMES:

. . . you said that, when you, you know, provide that service to the President, . . .

A. Uh-huh.

VICE CHAIRMAN HOLMES:

. . . do you offer it at the same rate that they were getting it from Bell; did you say?

A. That's what I was trying to answer. I got mixed up with the question, the wholesale and retail rate. We offer it at approximately the same retail rate that Bell would offer it.

VICE CHAIRMAN HOLMES:

Okay. You get it at a discount, but you offer it at the same retail rate?

A. That's right.

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VICE CHAIRMAN HOLMES:

You still lose money off of that . . .

A. Yes, and the reason is, even though we buy it as a wholesale, we have our own additional costs, and there are many of them, and so you would have to factor those in.

MR. KITCHINGS:

Thank you. I don't have anything further, Chairman Helton.

CHAIRWOMAN HELTON:

Thank you. You may be excused.

A. Thank you.

CHAIRWOMAN HELTON:

We'll take our lunch break and reconvene at 1:15.

OFF THE RECORD
RECESS FOR LUNCH

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CHAIRWOMAN HELTON:

Mr. Kitchings, that's all the witnesses I had for ICG, so I think we're ready for your first witness.

MR. KITCHINGS:

Okay. Thank you, Chairman Helton. BellSouth would call Dr. Bill Taylor.

WITNESS SWORN

The witness, WILLIAM E. TAYLOR, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KITCHINGS:

Q. Would you please state your name and business address?

A. My name is William E. Taylor. My business address is National Economic Research Associates, Inc., One Main Street, Cambridge, Mass. 02142.

Q. By whom are you employed and in what capacity, Dr. Taylor?

A. National Economic Research Associates or NERA. I'm Senior Vice President and head of the Communications Practice.

Q. Are you the same William E. Taylor who caused to be prefiled 26 pages of direct testimony and one Exhibit?

A. Yes.

Q. And also 33 pages of rebuttal testimony?

1 A. That's correct.

2 Q. Do you have any additions, deletions, or corrections to
3 your testimony?

4 A. One typo. In the direct testimony, Footnote 19,
5 replace the "Id.," that is it starts "Id.," with the
6 phrase "MA ISP Compensation Order." So change "Id." to
7 Massachusetts ISP Compensation Order.

8 Q. And, just so the record is clear, Dr. Taylor, is that
9 on Page 17 of your testimony?

10 A. Yes.

11 Q. Thank you. Dr. Taylor, if I were to ask you the same
12 questions as contained in your direct and rebuttal
13 testimony, would your answers be the same?

14 A. Yes, they would.

15 MR. KITCHINGS:
16 Chairman Helton, at this point, we would move Dr.
17 Taylor's direct and rebuttal testimony, along with
18 his Exhibit, into the record.

19 CHAIRWOMAN HELTON:
20 So ordered.

21 MR. KITCHINGS:
22 Thank you. I have nothing further of this witness
23 at this time, and he's available for questions.

24 CHAIRWOMAN HELTON:
25 Mr. Kramer?

1 MR. KRAMER:

2 Thank you.

3 CROSS EXAMINATION

4 BY MR. KRAMER:

5 Q. Good afternoon, Dr. Taylor. Dr. Taylor, can we agree
6 that, with respect to either a call directed to an ISP
7 or a call directed to an interexchange carrier from a
8 BellSouth subscriber, that, when the subscriber
9 initiates the call, the subscriber is the cost causer
10 for the call in either of those situations?

11 A. Yes. The subscriber, the customer, whatever you want
12 to call him, is the person who caused the cost and, in
13 my testimony, I point out it is acting as a customer of
14 the ISP or the IXC; not as a customer of BellSouth.

15 Q. And would you agree with me that, assuming it were
16 possible to do so, it would be desirable to push the
17 costs of those calls as close back to the cost causer
18 as possible?

19 A. Yes. I agree that it would be more efficient if the
20 end user, the customer, faced a price for whatever he
21 did, sending a message to the Internet or calling long
22 distance or calling local, for that matter, faced a
23 price which reflected the full cost that that act
24 entailed.

25 Q. Now, as I understand your testimony, Dr. Taylor, it is

1 that, in general, calling patterns have changed such
2 that the average length of a call is now greater than
3 at the time the current rates were put in effect and
4 that there is a greater volume of calling, and, as a
5 result, there is a shortfall in cost recovery on some
6 calls?

7 A. Yes, and there is a third reason, I believe, namely,
8 the ISP-bound calls, one thing we know about them is
9 that they are not local calls as far as jurisdiction is
10 concerned. The FCC has taught us that. So, whatever
11 they are and for the other two reasons that you gave,
12 they haven't been included in measures of average
13 calling volumes or lengths of durations so they're not
14 part of the costs that were used to set local rates.

15 Q. So your testimony is that it is those calls that are
16 driving up the overall average so that the overall
17 average of a call is out of sync with what it was when
18 the current rates were originally put into effect?

19 A. Well, I believe that's a true statement, but I'm more
20 concerned not about what happens to the average but
21 rather that a particular set of calls, namely, these
22 interstate ISP calls, are not - there is no charge for
23 them that recovers the costs that they impose on both
24 BellSouth's network and ICG's network.

25 Q. So neither ICG nor BellSouth is recovering their full

- 1 costs of providing the service for those calls; is that
2 your testimony?
- 3 A. Well, I can't speak for ICG, because ICG is recovering
4 costs. They're charging money to the ISP, and, whether
5 the money that they receive from the ISP covers their
6 cost for serving all of the in-bound calls or not, I
7 couldn't tell you, but I can tell you that, in the
8 mechanism of setting rates that BellSouth has been
9 through, that call volumes and, in particular, ISP-
10 bound interstate calls were not part of the
11 calculation.
- 12 Q. But isn't it true that ISPs, in general, take service
13 out of the local business exchange tariffs?
- 14 A. No. They do that when they take service from
15 BellSouth; that is, I think BellSouth, by FCC rule, is
16 forbidden to do anything else. I don't believe - I'm
17 not a lawyer, but I don't believe that applies to
18 CLECs. I believe you and other CLECs provide service
19 to them out of whatever tariff or whatever pricing
20 arrangement works in the market.
- 21 Q. But, as a competitive matter - let's lay to one side
22 the question of whether they take out of the local
23 business exchange tariff when they take from a CLEC.
24 As a competitive matter, isn't the price that a CLEC
25 can charge an ISP constrained by the fact that the ISP

1 always has the option of going onto the BellSouth
2 network under the local business exchange tariffs?
3 A. Sure. Yes, that's correct.
4 Q. And paying the local business exchange tariffed rates?
5 A. That's correct.
6 Q. Now, this Commission, of course, has authority over the
7 local business exchange rates; doesn't it?
8 A. Yes.
9 Q. Now, Mr. - or excuse me. Dr. Taylor, I'll try not to
10 do that again. Will you agree with me that, if we have
11 two calls of equal length . . .
12 A. Equal duration.
13 Q. Equal duration. Thank you.
14 A. Right.
15 Q. Yes, we had that confusion . . . of equal duration, one
16 call going to an ISP, the other call staying as a
17 circuit-switched call and terminating at another end
18 user, both calls utilizing the same switching path and
19 the same amount of transport, that the costs of those
20 two calls are the same?
21 A. Yes, I think we can agree that the costs of the calls
22 are the same, but, of course, the calls are different
23 in other respects, mostly the regulatory respect that
24 the ESP exemption constrains pricing for one where it
25 doesn't the other.

1 Q. And I take it your notion would be that, because the
2 ESP exemption constrains the pricing for one and not
3 the other, that the ISP call, in essence, is a
4 subsidized call.

5 A. Yes. I believe it is the case that - well, in fact, I
6 know it is the case since, at the margin, most end
7 users pay zero for an ISP-bound call even of 20 minutes
8 duration that that particular call - the revenues the
9 carrier receives from that call does not cover its
10 costs; that costs are not zero.

11 Q. But, in a flat rated environment, the revenue is also
12 zero for a 20 minute call from one end user to another
13 end user; isn't that correct?

14 A. That's correct.

15 Q. And, if there is a subsidy, assuming, as you say, that
16 there is a subsidy on those Internet calls, the subsidy
17 would be to the cost causer who is obtaining service at
18 less than the costs that that cost causer is causing?

19 A. Well, let's be careful. The subsidy is to whoever
20 places Internet ISP-bound calls. So, ultimately, I
21 think, if you go and look and see who will end up
22 paying it and who will end up receiving it, it's
23 certainly being received by anyone who makes dial-up
24 ISP Internet calls. Who's paying it? Well, the whole
25 nexus of contribution that comes to local exchange

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carriers or any local exchange carrier who originates such calls, that's who's paying it.

MR. KRAMER:

If I could have just a moment to review some notes here? Madam Chairman, I have nothing further.

CHAIRWOMAN HELTON:

Thank you. Ms. Dougherty?

MS. DOUGHERTY:

No questions.

CHAIRWOMAN HELTON:

Thank you.

MR. KITCHINGS:

Just a moment, Chairman, if I may. No redirect, Chairman Helton. Thank you.

CHAIRWOMAN HELTON:

Thank you. Mr. Taylor, I believe you're dismissed.

A. Thank you.

MR. KITCHINGS:

BellSouth's next witness is David Coon, and Ms. Foshee will be handling the direct of that.

WITNESS SWORN

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The witness, DAVID A. COON, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. FOSHEE:

Q. Please state your name for the record.

A. My name is David A. Coon.

Q. Mr. Coon, your business address, please?

A. It is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. Mr. Coon, did you cause to be prefiled in this proceeding nine pages of rebuttal testimony and two Exhibits?

A. I did.

Q. Do you have any changes or corrections to that testimony?

A. Yes, I do. I have one minor change to my rebuttal testimony.

MR. KRAMER:

I'm sorry. Where was that, Mr. Coon?

A. It's my rebuttal testimony. It's on Page 8, Line 2, at the top. The words "explicit measurement by measurement" should be replaced with "category by category."

Q. Do you have any other changes or corrections?

A. No, I do not.

1 Q. Mr. Coon, for the record, could you state your position
2 with BellSouth?

3 A. I'm Director of Interconnection Services.

4 Q. Mr. Coon, if I asked you the same questions contained
5 in your rebuttal testimony from the stand today, would
6 your answers be the same?

7 A. They would be.

8 MS. FOSHEE:

9 I would like to move the rebuttal testimony and
10 two Exhibits of Mr. Coon into the record.

11 CHAIRWOMAN HELTON:

12 So ordered.

13 MS. FOSHEE:

14 Thank you. Mr. Coon is available for cross
15 examination.

16 CROSS EXAMINATION

17 BY MR. KRAMER:

18 Q. Good afternoon, Mr. Coon.

19 A. Good afternoon, Mr. Kramer.

20 Q. Mr. Coon, since we were together in Tennessee a couple
21 of weeks ago or so, BellSouth has filled in several of
22 the performance measures contained in your category-by-
23 category comparison in Exhibit 2; is that correct?

24 A. I believe it's the same Exhibit that we filed in
25 Tennessee. I could be mistaken, but I believe it's the

1 same one.

2 Q. Well, Mr. Coon, could you turn to your Exhibit 2?

3 A. I'm there.

4 Q. Let's work backwards if we can. Beginning on Page 4,
5 hasn't Category IX, poles, conduits, and rights-of-way,
6 been filled in?

7 A. Well, it may have been. Mr. Kramer, I don't recall
8 what was in Tennessee.

9 Q. All right. What about Category X, directory assistance
10 database?

11 A. Directory assistance, Category XI?

12 Q. I'm sorry; Category XI. I'm sorry. Excuse me.

13 A. That may have been. Again, I forget the timing. As we
14 discussed in Tennessee, our measurement process is
15 continuing to be enhanced associated with the needs of
16 the marketplace. So we're trying to be a little bit
17 more responsive here in this Exhibit.

18 Q. Well, Mr. Coon, there is a difference between being
19 responsive to the marketplace by updating standards and
20 filling in categories that were formerly empty; isn't
21 there?

22 A. Well, we're trying to provide a little clarity in our
23 measurements, and, as we talked about in Tennessee and
24 as I just amended my testimony, this Exhibit is a
25 category-by-category comparison, . . .

1 Q. Right.

2 A. . . . and you'll recall that we did volunteer to
3 provide a measurement-by-measurement comparison in
4 Tennessee, which will probably be much more responsive
5 than what this is.

6 Q. I'm aware of that. I was just trying, Mr. Coon, with
7 respect, again, just focusing for a moment on, for
8 example, Category XI, directory assistance database,
9 this is new information since Tennessee, isn't it, the
10 "Parity by Design - No distinction is made . . . ,"
11 etc., language?

12 A. It may be. I will accept that it is.

13 Q. All right. Well, subject to check, would you agree
14 with me that that's also true for Category IX, poles,
15 conduits, and rights-of-way?

16 A. I will accept that, subject to check; yes.

17 Q. And XIII, NXX?

18 A. Yes.

19 Q. And XIV, bona fide request?

20 A. Yes, I would.

21 Q. And all of VII, local number portability, on Page 3?
22 Excuse me.

23 A. Yes, I would.

24 Q. Now, Mr. Coon, do you recall, when we were in
25 Tennessee, we also asked you about a number of

1 measurements with aspects that were still under
2 development?
3 A. I do.
4 Q. And the aspects that were under development were things
5 like benchmarks and/or levels of aggregation?
6 A. Yes, I do.
7 Q. Do you know if any of the 21 measurements that were
8 under development that we referred to there have been
9 filled in since Tennessee?
10 A. Let me restate your question, where we have categories
11 under development associated with the measurements. I
12 think what you're asking me is have we done any more
13 work in that area; not the measurements themselves.
14 Q. Not the measurements themselves?
15 A. The measurements themselves are essentially complete,
16 and the answer to your question is yes. As a matter of
17 fact, today, if I'm not mistaken, we are filing
18 benchmarks, where we do not have retail analogs, in the
19 Louisiana Commission associated with the Louisiana
20 Workshop. Now, let me mention that we have - if I
21 could take two to three minutes just for a little
22 clarification here, the benchmarks we are producing is
23 where we don't have a retail analog, and we have a
24 number of processes here where you don't have an
25 analogous retail process. In Kentucky, I looked at the

1 October data, and about 96 percent of the activity in
2 October in Kentucky was resale, either resale business,
3 resale residents, or resale design, and the definition
4 of the benchmark there is parity with retail. So 96
5 percent of the time in Kentucky the measurements that
6 we're producing today have a benchmark and that's
7 parity with BellSouth retail. We're producing about
8 8,000 numbers a month at the state level in Kentucky,
9 and, if the Commission staff has been into PMAP and
10 looked at the numbers, they probably have seen a number
11 of those numbers. We don't have product disaggregation
12 currently on some of the products that Ms. Rowling
13 mentioned this morning, but we're probably talking
14 about less than 1 percent of the activity that would be
15 in a typical state, such as Kentucky.

16 Q. When you say that you have all those developed, Mr.
17 Coon, that is still - as we just discussed, many of
18 them are very recent and are just being completed as
19 we're speaking, even; isn't that correct?

20 A. Yes, you're right, and let me clarify if you will allow
21 me.

22 Q. Excuse me. I'm sorry.

23 A. The local number portability measurements, we do plan
24 to produce measurements on local number portability
25 starting the middle of this month, and the reason it

1 has taken until December to do that is because an
2 industry forum was established sometime back to
3 establish the procedures to put in local number
4 portability or to put it in service, and, until those
5 procedures are fully functional and developed, you
6 can't measure the processes. The procedures were put
7 into place, formalized earlier this year, and we
8 determined they have got a way to measure it. The
9 benchmarks, we didn't think it would be fair to
10 establish benchmarks unless we had adequate data, and
11 we have roughly 18 months' worth of data now, and we
12 think that we can probably establish some benchmarks.
13 In fact, in the Louisiana Commission Workshop, we
14 proposed a set of retail analogs back as early as March
15 of this year to a number of CLEC participants there,
16 and we've been negotiating with them ever since to try
17 to get a set of benchmarks just for Louisiana which we
18 would hope would have regional applicability.

19 Q. Well, Mr. Coon, you mentioned Louisiana. Isn't it true
20 that, in Louisiana, the CLECs who are involved there
21 have not yet signed off on or are not yet in agreement
22 with either the performance measures or the benchmarks
23 that have been proposed?

24 A. That's partially correct. The benchmarks that we are
25 producing in Louisiana are as a result of the Louisiana

1 Commission Order. There was a hearing that was held
2 back in 1998. An Order resulted from that, and our
3 measurements in Louisiana are consistent with that
4 Order. The workshop was a part of that Louisiana
5 Commission Order to refine, clarify, understand the
6 measurements. So the measurements themselves are
7 consistent with what the Commission ordered. You are
8 correct that the benchmarks - we're still in the
9 negotiation process with the CLECs, and, as I mentioned
10 earlier, we've been going through that since early this
11 year.

12 Q. And aren't there still some negotiations regarding a
13 number of the performance measures as well?

14 A. Yes. Yes. That workshop is still underway.

15 Q. And I take it you're also doing a workshop in Florida
16 where you've just received, I believe on November 19, a
17 series of comments from CLECs who are not happy with
18 the BellSouth proposed service quality measures.

19 A. You're right. I don't believe I would couch the term
20 as being not happy with the measurements. The purpose
21 of the workshop in Florida, which the first day of
22 which was yesterday, is that we have been ordered to
23 conduct third-party testing in Florida of our operation
24 support systems, much as we're doing in Georgia, and
25 Florida has not had a generic docket or a performance

1 measurements docket. So the question is, if you're
2 going to have a third-party test, what do you use as a
3 measure of success. That's the purpose of the
4 workshop, is to develop some interim measurements until
5 those performance measurements can be formalized in a
6 generic docket, which will probably be later, well, in
7 the year 2000 sometime.

8 Q. And, speaking of the year 2000, it's also my under-
9 standing that the measurements in Louisiana are not
10 scheduled to go to final hearing until May, 2000; isn't
11 that correct?

12 A. That's correct.

13 Q. So there's still a lot of work to be done on the
14 performance measurements and on the benchmarks; is that
15 correct?

16 A. Well, as I mentioned earlier, these measurements,
17 whether you take Texas' measurements or whether you
18 take Georgia's measurements, which you all agreed to in
19 Georgia, if you recall, to accept our measurements, or
20 whether you . . .

21 Q. I'm sorry. Go ahead. Excuse me.

22 A. . . . take a Louisiana set of measurements, I think it
23 would be a mistake to say that they're cast in
24 concrete; they're never going to change. They're
25 always going to be evolving to react to new market

- 1 conditions, new products, new needs for measurements,
2 etc.
- 3 Q. But we're not just talking about evolution. Mr. Coon,
4 isn't it correct that the issue here is whether the
5 standards are as complete and as comprehensive as the
6 CLECs would like to see them?
- 7 A. Well, again, the performance measurements, the purpose
8 of performance measurements, is to enable the
9 Commission to detect nondiscriminatory access in a
10 consistent manner, and, once again, if you look at
11 everything that we're doing, we're capturing 96
12 percent, just based on October data in Kentucky, of the
13 data that this Commission would need to detect
14 nondiscriminatory access. We're not going to measure
15 everything. I mean, as I stated before, we've got
16 almost 8,000 numbers out there and that's an awful lot.
17 If we continue to add more and more and more things to
18 it, the question that you need to ask yourself is does
19 it clarify or does it confuse the situation in
20 detecting nondiscriminatory access.
- 21 Q. And the position of the CLECs, of course, in these
22 proceedings, Mr. Coon, has been that a number of these
23 measures are needed in order to clarify; isn't that
24 right, as opposed to confuse?
- 25 A. It's a collaborative process. The CLECs have their

1 needs, and we're trying to meet them as best we can.

2 Q. Mr. Coon, on Page 6 of your rebuttal testimony, and I'm
3 on Lines 12 and 13, you refer to the fact that there
4 are in excess of 70 CLECs in Kentucky who have already
5 signed agreements with BellSouth that include the
6 BellSouth SQMs. Do you know how many of those CLECs
7 are actually active?

8 A. No, sir, I don't. I would guess that there's probably
9 30 or 40. The difference is those CLECs have signed a
10 regional agreement which would have applicability in
11 Kentucky, once the CLEC is certified here.

12 Q. So many of them would not yet even be certified in
13 Kentucky?

14 A. Some of them; you're correct.

15 Q. Mr. Coon, let me direct your attention to Page 8 of
16 your rebuttal testimony, and I'm in the answer that
17 begins on Line 18. You are describing the levels of
18 delineation in the BellSouth SQMs. You say there are
19 six. Now, with respect to the levels of disaggre-
20 gation, which is No. 5, that is, of course, one where
21 there is still significant development work going on;
22 isn't that correct?

23 A. As we discussed, there are some products which we are
24 disaggregating, local number portability being one. We
25 are breaking out some UNE, unbundled network elements.

1 I don't know that I would categorize that as being
2 substantial. Again, in Kentucky, 96 percent of the
3 measurements today are readily identifiable by a unique
4 product set.

5 Q. And the same is true with respect to benchmarks; isn't
6 it? That is, that the benchmarks are also still - many
7 of those are still under development; isn't that
8 accurate?

9 A. We are in the process of developing benchmarks; that is
10 correct.

11 MR. KRAMER:

12 I think I have nothing further, Madam Chairman.

13 MS. DOUGHERTY:

14 No questions, Your Honor.

15 CHAIRWOMAN HELTON:

16 Thank you. Redirect?

17 MS. FOSHEE:

18 Yes, just a few questions. Thank you.

19 REDIRECT EXAMINATION

20 BY MS. FOSHEE:

21 Q. Mr. Coon, Mr. Kramer asked you whether, I think it was
22 he said, there was a lot of work left to do on
23 BellSouth's measurements. Is it BellSouth's position
24 before this Commission today that its SQMs, as
25 presented, are appropriate to assess nondiscriminatory

1 access?

2 A. Absolutely.

3 Q. And have you compared BellSouth's SQMs with ICG's

4 proposal to confirm your opinion that they're

5 sufficient to assess nondiscriminatory access?

6 A. Yes, I did.

7 Q. Okay. Is that your DAC-2?

8 A. No, it was not. That was a category-by-category

9 comparison. We are in the process, as Mr. Kramer

10 mentioned earlier - we were asked in the Tennessee

11 proceeding to do just that, to make a measurement-by-

12 measurement comparison, and we're in the process of

13 doing that and have it largely complete.

14 Q. Is that something you could provide to this Commission

15 if this Commission were so interested?

16 A. Certainly could.

17 Q. Okay. And then Mr. Kramer asked you some about the

18 Louisiana collaborative process. Is it a fair

19 statement to say that BellSouth's SQMs are the result

20 of collaborative work with the CLEC community?

21 A. I would say, yes, that is an accurate statement. It's

22 the result of collaborative work if you want to use

23 hearings. That would fall in that definition in four

24 states, including the Louisiana Workshop, in which

25 CLECs, BellSouth, all parties had an opportunity to

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present their views, and our measurements are a result of that.

MS. FOSHEE:

Thank you. I have no further questions.

CHAIRWOMAN HELTON:

Mr. Coon, you will provide the Commission, please, with a category-by-category comparison that you're going to do in Tennessee.

A. Yes. Yes, we will.

CHAIRWOMAN HELTON:

Thank you.

VICE CHAIRMAN HOLMES:

When do you hope to have that completed? Do you have any idea?

A. It's complete in draft form as we speak. I believe we have to file it with the Tennessee Commission next week, I think, December 8, if I'm not mistaken, and we can provide it at that time.

CHAIRWOMAN HELTON:

At the same time? Thank you. Recross?

MR. KRAMER:

No. No.

CHAIRWOMAN HELTON:

Thank you, Mr. Coon.

A. Thank you.

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MR. KRAMER:

Madam Chairman, may we have just a minute?

CHAIRWOMAN HELTON:

Yes.

MR. MERSHON:

Madam Chairman, while they're conferring, we had an additional witness, Ms. Caldwell, and I believe that Ms. Caldwell would be stipulated. It was our understanding that she would . . .

MR. KRAMER:

She's stipulated.

MR. MERSHON:

She's stipulated, and . . .

CHAIRWOMAN HELTON:

Correct.

MR. MERSHON:

. . .so we would move her testimony into the record as stipulated.

CHAIRWOMAN HELTON:

So ordered. Are you ready, Mr. Kramer?

MR. KRAMER:

Yes. Thank you.

CHAIRWOMAN HELTON:

Okay. Call your witness.

1 MS. FOSHEE:

2 Would you like to swear him?

3 CHAIRWOMAN HELTON:

4 Yes.

5 WITNESS SWORN

6 The witness, JERRY D. HENDRIX, after having been
7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MS. FOSHEE:

10 Q. Please state your name for the record.

11 A. My name is Jerry D. Hendrix.

12 Q. And your position with BellSouth?

13 A. I'm Senior Director, Interconnection Services.

14 Q. And could you state your business address, please?

15 A. Yes. It is 675 West Peachtree Street, Atlanta,
16 Georgia.

17 Q. Mr. Hendrix, did you cause to be prefiled in this
18 proceeding 53 pages of direct testimony?

19 A. Yes, I did.

20 Q. And did you have nine Exhibits to that testimony?

21 A. Yes, I did.

22 Q. Do you have any changes or corrections to your direct
23 testimony?

24 A. No, I do not.

25 Q. And did you also cause to be prefiled 50 pages of

1 rebuttal testimony?
2 A. Yes, I did.
3 Q. And two Exhibits to that testimony?
4 A. That is correct.
5 Q. Do you have any changes or corrections to your rebuttal
6 testimony?
7 A. No, I do not.
8 Q. Mr. Hendrix, if I asked you today from the stand the
9 same questions contained in your direct and rebuttal
10 testimony, would your answers be the same?
11 A. Yes, they would.
12 MS. FOSHEE:
13 I would like to move his direct and rebuttal
14 testimony plus 11 Exhibits into the record.
15 CHAIRWOMAN HELTON:
16 So ordered.
17 MS. FOSHEE:
18 Mr. Hendrix is available for cross examination.
19 CHAIRWOMAN HELTON:
20 Mr. Kramer?
21 MR. KRAMER:
22 Thank you.
23
24
25

1 CROSS EXAMINATION

2 BY MR. KRAMER:

3 Q. Mr. Hendrix, I would like to start by asking you a few
4 questions about your Exhibits JH-4. I'm sorry; it's
5 JH-5.

6 A. Yes, sir, I have it. I also have a larger copy. I
7 don't know if it would be of any use here or if this is
8 fine.

9 CHAIRWOMAN HELTON:

10 I think we have them.

11 A. Okay.

12 Q. All right. Now, Mr. Hendrix, focusing, first, on
13 Diagram B of your Exhibit JH-5, this is a situation you
14 have where you are illustrating the payment of
15 reciprocal compensation, and the way you've drawn it,
16 it's a two-way diagram. I would like to just work from
17 the left to the right, if that's okay. So we'll just
18 have the traffic flowing in that direction for the
19 moment.

20 A. That's fine.

21 Q. Okay. Now, in this situation, an end user on the ILEC
22 network initiates a call that goes to the ILEC central
23 office, through the tandem, to a CLEC end office and on
24 to the end user, and you will agree that there is
25 reciprocal compensation paid in this situation?

1 A. For local calls, that is correct.

2 Q. Yes, for local calls. Now, in this situation, am I
3 correct that the reason reciprocal compensation would
4 be paid is because the terminating CLEC in this diagram
5 would be incurring transport costs between the ILEC
6 tandem and the CLEC end office and switching costs to
7 terminate the call to the end user on the right side of
8 the diagram?

9 A. That is right and, again, that is for local calls, true
10 local calls, as contemplated per the Act.

11 Q. That's contemplated what?

12 A. Per the Act.

13 Q. Per the Act. Mr. Hendrix, would you agree with me
14 that, in this situation, because BellSouth is not
15 incurring the cost of terminating the call - assuming
16 cost-based rates, because BellSouth is not incurring
17 the costs of terminating the call and, if it sends the
18 call to a CLEC, it saves the cost - excuse me - it does
19 not incur the costs of terminating the call, it is
20 therefore indifferent as between terminating the call
21 and sending the call to the CLEC for termination?

22 A. I think there were about five parts to that question.

23 Q. There are a lot of pieces to hold together. Do you
24 want me to try it again?

25 A. If it's okay, if I could just state it, and you could

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tell me if I'm . . .

Q. Sure. Sure.

A. . . . capturing what you're asking. I believe what you're asking is, is BellSouth agreeing to compensate the CLEC that is on the right for this call for the costs the CLEC is incurring in transporting and terminating that call, and the answer is yes. For true local calls, we are agreeable. I did not understand the part about being indifferent.

Q. All right. Well, let me try that again. Assuming cost-based rates, if BellSouth terminated the call itself as in Diagram A, BellSouth would incur the termination costs on the right side of the diagram. In Diagram B, BellSouth does not incur those termination costs, assuming cost-based rates, so that it pays the CLEC the same rate to terminate the call as BellSouth's savings because it does not have to terminate the call. Shouldn't BellSouth be indifferent as to whether it terminates the call or it sends the call to the CLEC since the cost is the same to it in either case?

A. Based on your assumption, I would say, for true local calls, BellSouth, based on the rates assuming cost-based rates, would, in fact, recover its costs from the end user in Diagram A and, in Diagram B, will pay the CLEC for terminating that call because BellSouth is not

1 incurring those costs to terminate the call to the end
2 user. I hope that's responsive to what you're asking.

3 Q. Yes, it is.

4 A. Thank you.

5 Q. And I take it we would agree that that's an acceptable
6 result because the guiding principle here is that
7 everyone is compensated for the costs they incur in
8 terminating the call, in originating and terminating
9 the call; excuse me.

10 A. The answer is yes, but it must be qualified, and it's
11 qualified to the point that, in this case, you have a
12 true local call, and BellSouth will bill the end user
13 whatever BellSouth is authorized to bill the end-user
14 customer. So it's actually getting its money from the
15 end-user customer. BellSouth is not incurring costs in
16 Diagram A that it's not recovering, making these same
17 assumptions, from the end-user customer. In Diagram B,
18 while BellSouth is still getting money from the end-
19 user customer, BellSouth is compensating the CLEC on
20 the far right because of the costs the CLEC is actually
21 incurring for true local traffic.

22 Q. And so each party to the transaction is recovering or
23 being compensated for its costs?

24 A. The answer is yes, using your assumptions.

25 Q. And, just to finish the question, BellSouth and the

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CLEC?

A. Yes, using your assumptions, I would agree.

Q. Right. I think this is the last one on this particular point, but I take it we would also agree that, in Diagram B, as contrasted with Diagram A, because the CLEC is incurring costs to terminate a call from a BellSouth subscriber, it is appropriate for the CLEC to get reciprocal compensation.

A. And the answer is yes, but you have contrasted Diagram B with Diagram A, and I think the critical thing to point out in contrasting the two is that Diagram B you have arrows going to the right as well as to the left and that's assuming that both parties would have traffic going back and forth and, as such, both parties would compensate each other for traffic that is transported and terminated on the other party's network.

Q. Yes. I understand that's your assumption. I was just focusing on a call, for the moment, moving from the left to the right to simplify.

A. Yes, sir.

Q. Okay. Now, if there were no - well, let's go to Diagram F for a moment.

CHAIRWOMAN HELTON:

Which Exhibit?

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MR. KRAMER:

I'm sorry. Excuse me. It's Exhibit JH-7. It's two pages over.

Q. Would you agree with me that what is, in Diagram F, characterized as the ICO/CLEC - would you agree with me that the ICO/CLEC in Diagram F as well as the CLEC in Diagram B both incur costs in switching and delivering the traffic coming from the left side of the diagram?

A. I would agree that they both could, in fact, recover costs, but there is a major difference in that you're talking two different kinds of traffic, and you're comparing apples and oranges, but I would agree that they both do, in fact, incur costs.

Q. They both do incur costs?

A. That's correct.

Q. And I take it you would agree with me that the functionality in delivering the calls in Diagram F and Diagram B is the same.

A. No, I would not agree that they are the same. I would agree that they are similar, but they're not the same.

Q. Well, if we go through it, Mr. Hendrix, isn't it true that, in each case, you have a call that traverses a - and just focusing on the terminating side of the call here or on the end side of the call, . . .

A. Is that the side to the right you're speaking of?

1 Q. To the right, yes.

2 A. Yes, sir.

3 Q. . . . would you agree with me that you have a call that
4 goes through a tandem switch to an end office on to a
5 user premises?

6 A. I would agree that you have a call going through the
7 tandem switch. There is also an office on the right as
8 indicated by the circle in both diagrams, but then,
9 once you get beyond that circle, while it is similar,
10 the functions are slightly different in that, one, if
11 you were to look at Diagram B on JH-5, there is a
12 different type of service going to that end-user
13 customer than the service that is likely to go from the
14 end office denoted with a circle, the ICO/CLEC end
15 office. It's a different type of service. Also the
16 functions that are performed in the Diagram F, on the
17 far right, is, of course, different. So I would say
18 they are similar, but they are different, and the fact
19 is it's difficult beyond the tandem to draw a parallel
20 between Diagram F and Diagram B.

21 Q. Well, let's just focus, if we might, Mr. Hendrix, on
22 the technical functionality. I understand you have
23 some issues with respect to whether the service is the
24 same, and I want to just put those aside for the
25 moment. I understand that's an issue, and I understand

1 you're not conceding anything with respect to the
2 service, and I just want to focus on the technical
3 functionality and on the network characteristics of the
4 call, if we might, and, again, focusing at that level
5 and assuming that there is equal distances of transport
6 and roughly equal loop lengths involved in both the
7 call in Diagram B and the call in Diagram F, would you
8 agree with me that a call traverses the ILEC tandem and
9 is transported to an end office and goes and is then
10 delivered - let me use that phrase - by that end office
11 to a premises? Now, would you agree with me that far?

12 A. No, I can't go that far. Just as I previously
13 mentioned, the functions are very similar, but, when
14 you look at the services that are being ordered by the
15 customer to complete that call from the tandem out,
16 they could be quite different. I don't want to argue
17 that they aren't similar. I have a problem with them
18 being the same.

19 Q. Well, Mr. Hendrix, let me be clear. I'm not trying to
20 focus on the service. I'm just trying to focus on what
21 happens with the technical characteristic. The call
22 goes to the tandem. It's transported. It goes to an
23 end office, and it's then delivered to a premise. Now,
24 I understand you have an issue with what happens once
25 it gets to that premise. I understand that, but would

1 you agree with me that, until it gets to that premise,
2 the technical functions performed on the local exchange
3 carrier network, just the technical functions, ignoring
4 the service for the moment, the technical functions are
5 the same; would you agree with me on that?

6 A. Okay. Let me see if I can help to draw this to
7 closure. I would agree that they're very similar. I
8 would agree that you have end office switching on the
9 left. You have tandem switching on both calls on the
10 right. You have a switching function that is taking
11 place at both end offices with the circle, and then you
12 have a premise on the right; one is the carrier, and
13 one is the end user. I would agree that, from that
14 standpoint, if I can draw a closure to that, that those
15 functions are very similar and, in many cases, one
16 would argue that they could very well be the same.

17 Q. They could very well be identical?

18 A. That's correct,

19 Q. And, just accepting for the moment your characteri-
20 zation of a carrier on one end - I understand and I
21 appreciate your effort to try to work that through -
22 and since those functions would be the same and we've
23 agreed they could be identical, the costs involved
24 would be the same?

25 A. Not necessarily; no. They could be very similar, but

1 that has a lot to do with the service that is being
2 terminated and how that service is being transported.

3 Q. Well, let me rephrase the question. I think I
4 understand what's troubling you. The costs incurred in
5 performing the functions - the costs incurred by
6 switching the call, by transporting it, and then by
7 delivering it over the loop - are the same for the two,
8 ignoring . . .

9 A. No, sir, they're not.

10 Q. And why not?

11 A. They could be different because the service that is
12 going between the end office and the customer prem, on
13 one side you have a voice grade type service, which is
14 in Diagram B, and, in Diagram F, you may have a DS1 or
15 you may have a DS3 that's capable of carrying far more
16 than a single call path. So they're vastly different.
17 So their costs are different because the bases that
18 you're starting with are totally different.

19 Q. Well, Mr. Hendrix, I'm just focusing on a circuit-
20 switched call going to an ISP, and I'm just focusing on
21 the circuit-switched aspect of it between the tandem
22 and the time it gets to, in Diagram F, the box marked
23 "ISP or IXC" and, in Diagram B, the box marked "End
24 User," and, assuming those are just standard voice
25 grade circuit-switched calls, assuming again equal loop

1 length, equal transport, wouldn't you agree with me
2 that the costs up to that point are the same?
3 A. No, sir, I cannot because they're ordering different
4 services. I'm really trying to be . . .
5 Q. I'm . . .
6 A. I'm trying to answer the question, but they're ordering
7 different services. End users do not order DS1s and
8 DS3s or OC48s, while an ISP with the type of traffic
9 terminating to the ISP premises will order something
10 that's vastly different. So, on a per minute of use
11 basis, the basis that you're using to come up with
12 costs are totally different.
13 Q. But, Mr. . . .
14 A. They will be similar. The functions are similar in
15 that you would have tandem switching. You will have
16 end office switching. You will have end office
17 switching on the far left, but, once you get to the
18 transport service that's actually used to move that
19 call from the tandem switch to the prem it's totally
20 different. The calls may be similar in that the
21 functions may be similar, but the bases that you're
22 starting with is totally different.
23 Q. But, Mr. Hendrix, I'm assuming that we're dealing with
24 a voice grade circuit in both cases. I'm assuming
25 we're dealing with a voice grade circuit, a call that

1 goes all the way to the end user's premises, in Diagram
2 B, all the way to the end user's premises, is a voice
3 grade circuit, and a call that goes all the way to the
4 right side of Diagram F is a voice grade DS0. I'm just
5 assuming a normal circuit-switched dial-up Internet
6 access call from an end user that goes . . .

7 A. For the sake of this example, we can make those
8 assumptions as to just that they are but I'll be
9 willing to make those assumptions for the sake of
10 moving on, if you would like.

11 Q. Okay. Thank you. Okay. Now, you mentioned, in
12 connection with Diagram F, that you thought that, in
13 that situation, there would be no compensation. In
14 Diagram F, I'm talking about now.

15 A. Yes, sir, I did.

16 Q. Because the point that the call is delivered to, in
17 Diagram F, is a carrier; is that correct?

18 A. That wasn't the only reason I mentioned that. I would
19 agree, yes, that the point or the customer on the far
20 right is, in fact, a carrier, but the reason no
21 compensation is due is, in this example, you're looking
22 at ISP-bound traffic, and the FCC has made it very
23 clear, I believe, in Footnote 87 of the ruling that
24 came out in February of '99 that ISP traffic is
25 nonlocal interstate traffic. So we're talking access

1 traffic here, and the arrangement that you have here is
2 very similar to other access arrangements, wherein the
3 cost causers would, in fact, compensate those that are
4 incurring costs, and what should actually happen in
5 this diagram is the CLEC, and ISP is a customer of the
6 CLEC, the CLEC should actually compensate BellSouth
7 because the CLEC is receiving \$19.90, or whatever, from
8 the end-user customer. BellSouth is transporting and
9 switching a call. They get nothing for that call. The
10 CLEC is - when I say "\$19.90," the ISP is getting that
11 on a monthly basis from the end-user customer, and the
12 CLEC is getting from the ISP, if you look at Diagram F,
13 the piece between the ISP and the end office here.
14 They get that piece based on the service that is
15 actually ordered whether it's a DS1, DS3, or whatever.
16 So the only person that's not being compensated here is
17 BellSouth, but the bottom line is the FCC has classed
18 these to be interstate access calls and local traffic.
19 It isn't. So compensation isn't due.

20 Q. Mr. Hendrix, what you've basically just done is
21 summarized your second alternative; is that right?

22 A. I may have. I'm not certain.

23 Q. Okay. Now, to go back to the question, focusing again,
24 it's your contention that the ISP, in essence, is
25 functioning as a carrier there; is that correct?

1 A. Yes, it could be, definitely, because he's transporting
2 the call onto the World Wide Web. If you were to draw
3 another circle on the right side beyond the "ISP or
4 IXC," he has to have some transport to get onto the
5 World Wide Web where that call would terminate.

6 Q. Right. Well, didn't your analysis that you just went
7 through in response to not just the last question but
8 the prior one, when you summarized your Alternative 2,
9 didn't your analysis assume that the use being made by
10 the ISP of the network, everything to the left of the
11 little stop sign box, where you have "ISP or IXC,"
12 everything to the left of that, that that is the use of
13 the network that's essentially the same as an IXC makes
14 of the network? Isn't that your assumption? That
15 the . . .

16 A. I said the functions . . .

17 Q. I'm sorry. Excuse me.

18 A. I'm sorry.

19 Q. I was just going to say that the ISP's use of the
20 network is essentially the same as an IXC's and
21 therefore it ought to be treated as access.

22 A. I think what I mentioned, and I'm not sure which
23 example you're going back to, but the example I just
24 gave would indicate that this service that is being
25 offered is more of an access service similar to other

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access services that are offered.

Q. And wouldn't that be because the use the ISP makes of the network looks just like an IXC's use of the network?

A. I'm not certain that I follow your question. I'm sorry, but the ISP, in this case, is ordering the service from the CLEC customer, . . .

Q. Right.

A. . . . let's say ICG, to get the call moving from the left to the right from the CLEC's end office to the IXC or the ISP premises.

Q. And, under your analysis, what you want to do is treat this ISP just like an IXC?

A. I want to treat it the way it should be treated, and I'm not certain that I understand the question or whether I would even agree. I would like very much to treat it the way it should be treated, but the bottom line as to how BellSouth would like to treat it, it doesn't really matter. The fact of the matter is this is more of an access call, and the FCC has made it clear that it's not local, and the FCC has jurisdiction over this call, and I believe Footnote 87 classes it as a nonlocal interstate call, which is more access.

Q. And I take it you would agree with me that the FCC has also said that this is not going to be treated like an

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access call.

A. What they have actually - I don't know that I would agree totally with what you've stated. I think what they have stated is, for an interim period, they will not allow access charges to be assessed. They have not indicated that they will not treat it as an access call. We're not certain what they're going to do.

Q. Well, isn't it true that it is classified for separation purposes as a local call?

A. No, it's not.

Q. You mean, that the . . .

A. No, it's not. What the FCC ordered was to preclude any shock to customers, and, to allow this type of service to get up and running, they would allow ISPs, for a period of time, to order services from the basic service tariff, and, for that reason, in lieu of paying access charges, they are allowed to purchase these services. We do not treat it as local. We treat the services that they order, which is to access the vehicle that the carriers use, as local, but this traffic is not treated as local.

Q. Isn't the traffic recorded for separation purposes as local?

A. No.

Q. It's not?

1 A. The facilities that they use is recorded as local. If
2 there is any measured service customers, then, yes,
3 they would use that local traffic, and it's shown as
4 local, but I think . . .

5 Q. I'm sorry.

6 A. . . . that - measured service, . . .

7 Q. Measured service.

8 A. . . . measured service, yes, but I believe the
9 penetration on that may be small, but the bottom line
10 is, in lieu of paying access charges, the FCC ordered
11 that they would be allowed to purchase services from
12 the basic service tariff, and, in my mind, that's
13 simply a surrogate for an interim period for access.

14 Q. When did the FCC do that, Mr. Varner?

15 A. Mr. Varner?

16 Q. I'm sorry; Mr. Hendrix.

17 A. I'm not certain if you insulted me or Mr. Varner.

18 Q. I'm sorry. I'm sorry. I've seen a lot of Mr. Varner
19 sitting in that chair.

20 A. Mr. Varner and I are friends. In fact, we went to the
21 same school. In fact, I used to work for him. What
22 was your question? I'm rattled.

23 Q. When did the FCC grant this temporary exemption?

24 A. I believe it dates back to 1983.

25 Q. 1983?

- 1 A. That's correct.
- 2 Q. That was the interim exemption?
- 3 A. That is correct.
- 4 Q. And, Mr. Hendrix, just to go back, isn't it true a
5 moment ago you said that it would not be the usage; it
6 would be the facilities in a measured environment that
7 were classified as local because of the ESP exemption?
- 8 A. No. I think I said two things. I think I said, first,
9 the services that they order, which is a surrogate for
10 access, those services, since they are purchased out of
11 the local tariff, would be treated as local.
- 12 Q. Right.
- 13 A. In cases where you have measured service and we have to
14 show those minutes of use for measured service, and I
15 believe the penetration is very low, then that is
16 probably shown as local, but ISP traffic itself, while
17 it may be shown in ARMIS or whatever else as local
18 because we were ordered to, the FCC has long held this
19 to be interstate nonlocal traffic.
- 20 Q. But it is treated as local for purposes of, for
21 example, separations? Didn't you just agree with me on
22 that?
- 23 A. The services that they order, yes, are treated as
24 local.
- 25 Q. The services that they order and the revenues and the

1 costs incurred in providing the service are treated as
2 local; isn't that correct?

3 A. That's correct and that, too, is the result of us being
4 ordered to treat it in that fashion.

5 Q. Okay. Now, Mr. Varner - I'm going to keep doing it
6 now.

7 A. I could dye my hair, if you would like.

8 Q. I used to be able to say that, too, Mr. Hendrix. Now,
9 Mr. Hendrix, you said a moment ago that BellSouth is
10 not compensated for this traffic; is that right?

11 A. Yes, sir, I did.

12 Q. And so is it your contention that BellSouth is losing
13 money on this traffic?

14 A. I have never been asked that question, and this is my
15 personal answer on the spur of the moment. Since that
16 traffic is not considered as part of what we do in
17 residually pricing our basic service rates and we incur
18 costs, I would venture to say that perhaps we are.

19 Q. And isn't it true that the FCC just recently, in 1997,
20 again affirmed its treatment of ISPs as end users
21 exempt from access?

22 A. I'm not certain as to the exact words, but the Order
23 that you are referring to, and it uses different words
24 throughout the Order, . . .

25 Q. Yeah.

1 A. . . . so taking just one cite is not appropriate, the
2 intent of what they did was to affirm what they did
3 back in the eighties and that was simply to allow ISPs
4 to purchase basic services for the purposes of having
5 their end users access them, and they may have used end
6 users and, in other places, they said strictly for the
7 purpose of end users accessing them and to exempt these
8 carriers from the payment of access charges.

9 MR. KRAMER:

10 Madam Chairman, may I approach the witness?

11 CHAIRWOMAN HELTON:

12 Yes.

13 MR. KRAMER:

14 Madam Chairman, I've handed the witness an excerpt
15 from the FCC Access Charge Reform Order of May 16,
16 1997, which is recorded at 12 FCC Record 15982
17 (1997).

18 Q. Mr. Varner, could I . . .

19 CHAIRWOMAN HELTON:

20 Mr. Hendrix.

21 Q. Jesus! Mr. Hendrix, could I ask you to look at
22 Paragraph 346 of this Order which appears on Page
23 16133?

24 A. Yes, sir, I have that.

25 Q. Could you read the first few sentences of that?

1 A. Yes. "We also are not convinced that the nonassessment
2 of access charges results in ISPs imposing
3 uncompensated costs on incumbent LECs. ISPs do pay for
4 their connections to incumbent LEC networks by
5 purchasing services under state tariffs."
6 Q. Would you mind to keep going?
7 A. I thought you said the first two sentences.
8 Q. I'm sorry.
9 A. "Incumbent LECs also receive incremental revenue from
10 Internet usage through higher demand for second lines
11 by consumers, usage of dedicated data lines by ISPs,
12 and subscriptions to incumbent LEC Internet access
13 services."
14 Q. Mr. Hendrix, isn't it also true that BellSouth has been
15 the beneficiary of an upsurge in its sale of second
16 lines and revenue from second lines?
17 A. I believe that is the case, yes, but I wouldn't say
18 that it's largely because of what the CLECs have
19 brought to the market. We've made a big effort to
20 encourage people to purchase second lines wherein they
21 will be able to use the Internet and access the
22 Internet services but also for other members of the
23 family.
24 Q. And, of course, BellSouth has its own ISP in the form
25 of BellSouth.net; doesn't it?

- 1 A. Yes, we have that service we do offer.
- 2 Q. And so BellSouth also generates substantial revenue
3 from subscriptions to incumbent LEC Internet access
4 services?
- 5 A. Would you say that again? I'm sorry.
- 6 Q. I was reading from the last part of the last sentence
7 you read, Mr. Hendrix; that the incumbent LECs generate
8 subscriptions - I am now quoting, ". . . subscriptions
9 to incumbent LEC Internet access services." That would
10 be to BellSouth.net; wouldn't it?
- 11 A. Yes, sir, that is the case. I think, in order to put
12 this Order in its proper context, while we have
13 additional lines, we also have BellSouth.net which is a
14 service we offer. What is being asked for here is for
15 us to incur additional costs for revenues that we do
16 not get to cover those costs and for costs that the
17 CLEC and the ISPs receive revenues to cover, and
18 BellSouth is the only one that is not compensated for
19 its costs in this arrangement.
- 20 Q. Of course, the FCC seems to feel you're getting amply
21 compensated from other sources based on what we've just
22 read; isn't that correct?
- 23 A. I think that's taking it out of context. I think that
24 is looking strictly before CLECs came into the market
25 asking that we compensate them for traffic that is

1 truly nonlocal traffic. So the proper context is to
2 add that to what is stated here, but this is totally
3 aside from the effort that we are here talking about.

4 Q. And, of course, the revenue from second lines and
5 BellSouth.net have only grown since this Order was
6 issued in May, 1997; isn't that correct?

7 A. I can't speak to that. I do not know.

8 Q. Okay.

9 MR. KRAMER:

10 Madam Chairman, may I have this marked as Cross
11 Exhibit 1? If you don't want it in the record, I
12 suppose it's fine as long as it's in . . .

13 CHAIRWOMAN HELTON:

14 You can go ahead and enter it into the record just
15 to be complete. So ordered.

16 HENDRIX CROSS EXHIBIT 1

17 Q. Okay. Mr. Hendrix, could I ask you to turn, please, to
18 your rebuttal testimony? In your rebuttal testimony, I
19 would like to turn to Pages 5 to 7. Mr. Varner, here -
20 Mr. Hendrix, I'm sorry. I really apologize to you, Mr.
21 Hendrix.

22 A. Oh, that's no problem. I will answer to almost
23 anything from now on.

24 Q. I really do. I really do. I'm sorry. Mr. Hendrix,
25 looking at Line 8, you . . .

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MS. FOSHEE:

Which page?

MR. KRAMER:

Page 5; I'm sorry.

Q. Mr. Hendrix, looking at Line 8, you have a quote there that reciprocal comp payments could reach \$2.6 billion by the year 2002; do you see that?

A. Yes, sir.

Q. Do you know what BellSouth's share of that would be?

A. No, I do not. What I could assume, and I do not think I would be far off in making this assumption, is that it would be its adequate share based on the size of the BellSouth region.

Q. And do you know what - what is the source of this information, Mr. Hendrix?

A. I believe it was - I'm trying to think of the source, and I may have that. The source was a study that was done by - I don't know. It may have been USTA. I can't remember exactly now. I may have it, and I could give you the source later, but it was an industry type effort of local companies.

MR. KRAMER:

Madam Chairman, we've not had an opportunity to see this data before we received Mr. Hendrix' rebuttal testimony. So I recognize that it's

1 unusual, but I would like to go through some
2 questioning of him on the data and stuff, because
3 there was no opportunity for discovery on this.
4 I'm sorry. I hope you'll indulge me on this.

5 Q. Can you supply a copy of the study for the record, Mr.
6 Hendrix?

7 A. Yes, I would be happy to provide whatever source info I
8 have on this.

9 Q. All right. Well, let's go through this. Do you know
10 what "by 2002" means? I mean, was that by the end of
11 the year, by the beginning of the year; do you know?

12 A. I would, and I'm only guessing, but the study will
13 validate either I'm wrong or right, I would think that
14 it would be by the start of the year. Usually that
15 would indicate through 2001, but I may well be wrong.

16 Q. Mr. Hendrix, are you familiar with DSL service?

17 A. DSL?

18 Q. Yes.

19 A. Yes, sir, I am.

20 Q. Digital subscriber loop?

21 A. Yes, I am.

22 Q. And isn't it true that DSL service is a broadband
23 access service to our Internet access that does not
24 involve reciprocal compensation?

25 A. Yes, it is. They use a different network.

1 Q. And isn't it . . .

2 A. The technology is different.

3 Q. Yes. Excuse me. Isn't it true that most of the major

4 BOCs, excuse me, Bell Operating Companies, and even

5 many CLECs are now doing major roll-outs of DSL

6 products?

7 A. I do not know about major CLECs. I know there are

8 quite a few in the BellSouth region that are, in fact,

9 using this product, and I do understand that many of

10 the ILECs are, in fact, rolling the product out.

11 Q. And that's true of BellSouth as well; isn't it?

12 A. We do, in fact, have some - we do have a roll-out

13 process; yes. That is correct.

14 Q. And doesn't the roll-out process consist of beginning

15 to market DSL through agents?

16 A. I'm not certain as to the market strategy, sir.

17 Q. Well, subject to check, would you agree with me that

18 one of the marketing agents for DSL is BellSouth.net?

19 A. It could be.

20 Q. And isn't it true, Mr. Hendrix, that, as DSL rolls out,

21 it will reduce the volume of circuit-switched Internet

22 traffic? It will draw traffic away?

23 A. No, I would not agree with that. I think, from what

24 I've seen, and I cannot quote the source at this time,

25 I think the penetration of Internet into households is

1 not at its peak, and I think you will still see growth
2 in that. I don't know whether that growth will stay at
3 the rapid rate, but I think it will definitely grow
4 some.

5 Q. Isn't it true that DSL products are being rolled out
6 for residential service?

7 A. Yes, it is.

8 Q. And isn't it true that some of the Internet access from
9 increased residential will be through DSL?

10 A. I believe it would be; yes.

11 Q. And it's also true that cable modem is rolling out in a
12 major way for Internet access; isn't it?

13 A. That is my understanding; yes, sir.

14 Q. And other broadband services?

15 A. Yes, sir, I do understand that.

16 Q. Do you know if the study that you're citing here took
17 account of any of these developments and of the trends
18 predicted for these other competitors for circuit-
19 switched access?

20 A. It has been awhile since I've looked at the study. It
21 may. I do not know, and I think, once we get a full
22 copy of the study and evaluate it, we can answer those
23 questions, but I'm just not certain, because it has
24 been awhile.

25 Q. Mr. Hendrix, on Page 6 of this, you give some data, and

1 you particularly give some figures regarding the
2 exchanges of reciprocal compensation based on
3 reciprocal compensation billings for ISPs; is that
4 right?

5 A. Yes, sir, I do.

6 Q. By the way, has BellSouth paid any of this?

7 A. For ISP traffic?

8 Q. Yes.

9 A. We have not knowingly paid for any . . .

10 Q. You have not knowingly. So none of this money is . . .

11 A. . . . but, in this state, no, I don't believe we have.

12 Q. So none of this is any money you've spent so far?

13 A. We have not knowingly paid for any.

14 Q. Have not knowingly paid. So we're looking at this
15 number now, and, Mr. Hendrix, are you saying to this
16 Commission that, based on this number alone and without
17 taking a look at BellSouth.net and all the revenue from
18 second lines and the DSL roll-out and all the other
19 increased revenues that BellSouth is realizing as a
20 result of Internet access, are you saying that this
21 Commission should look at this number alone and base
22 any kind of a determination on it?

23 A. Well, I think you made some very broad assumptions that
24 are totally inappropriate, and they're not right. You
25 assume that every market is growing and that . . .

1 Q. Excuse me, Mr. Hendrix. If you could, just answer yes
2 or no and then you can explain.

3 A. Okay. I am stating, based on this and based on their
4 knowledge of what ISP traffic is, yes, that we should
5 not compensate you for this traffic, but many of the
6 assumptions you use as a preface for the question are
7 totally inappropriate, and they're not right. The
8 first assumption is to assume that every market is
9 growing and revenues are growing in every market, and I
10 don't know that that is the case, but, clearly, here,
11 we're talking ISP-bound traffic. ISP-bound traffic,
12 while it has been made perfectly clear that it's
13 nonlocal interstate traffic, for us to be asked to
14 compensate any CLEC for this traffic is totally
15 inappropriate.

16 Q. But all of - excuse me. I'm sorry.

17 A. And, based on this data and not only on this data but
18 everything else that has been filed in this case and
19 what's in the various Orders, I am asking that they not
20 compensate or not require us to compensate for nonlocal
21 traffic through the agreement process. It's not
22 appropriate.

23 Q. But BellSouth is not putting on the table, regarding
24 the impact of ISP traffic on it, any of the other
25 revenues I referred to, the second line revenues,

1 BellSouth.net revenues? You don't regard any of that
2 as relevant to this Commission's look at whether or not
3 there should be compensation?
4 A. Definitely not.
5 Q. Okay.
6 A. This is the issue, and we're simply addressing this
7 issue, and this issue is whether we should pay for
8 nonlocal traffic, and the facts in the Order will speak
9 for themselves that it's not traffic that we should be
10 compensating any CLEC for as local.
11 Q. Mr. Hendrix, have you reviewed Mr. Starkey's direct
12 testimony?
13 A. Yes, sir, I have.
14 Q. Does it occur to you that the chart and this imbalance
15 may reflect the fact that CLECs are able to track the
16 ISP market easier because it is a new and emerging
17 market?
18 A. No, I would not agree with that, and the reason I will
19 not agree with that I have a bit of history with ICG
20 that perhaps most people do not have since I sign all
21 of the agreements and I negotiated the first one. ICG
22 was very much interested in a bill-and-keep arrangement
23 and had it in their first agreement, and so I think
24 this process of asking us to pay for this traffic, in
25 all honesty, my personal opinion is a process of gaming

1 which simply is not right. It's not fair. It's not
2 right. So that's what I believe is actually happening.
3 Q. Okay. Mr. Hendrix, if I could ask you - do you have a
4 copy of Mr. Starkey's direct testimony with you?
5 A. Yes, sir, I do.
6 Q. May I ask you to get it out? Thank you.
7 A. Yes, sir, I have it.
8 Q. Mr. Hendrix, could I ask you, please, to turn to Mr.
9 Starkey's Diagram 3?
10 MR. HATFIELD:
11 I think you're going to need the direct.
12 MR. KRAMER:
13 I think it's the rebuttal; isn't it?
14 MR. HATFIELD:
15 Diagram . . .
16 A. There is a Diagram 3 on . . .
17 CHAIRWOMAN HELTON:
18 There's a Diagram 3.
19 MR. KRAMER:
20 Yeah. I'm sorry. It is in the direct. Thank
21 you.
22 MS. FOSHEE:
23 It's Exhibit No. 4 to his testimony.
24 MR. KRAMER:
25 It's MS-4; yeah.

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CHAIRWOMAN HELTON:

Uh-huh.

A. Yes, sir, I am there.

Q. Mr. Hendrix, this is a conceptual drawing of ICG's network, and I would like to ask you a few questions. If ICG wanted to buy facilities to move traffic between its collocation at ILEC Central Office B and its collocation at ILEC Central Office D and it went to buy the facilities to move that traffic from BellSouth, wouldn't ICG buy transport from BellSouth?

A. They would purchase - well, they would purchase some form of transport, . . .

Q. Right.

A. . . . either a local channel or an interoffice.

Q. Transport?

A. That's correct.

Q. And, similarly, if ICG was buying the facilities to move traffic from, say, ILEC Central Office B to the ICG switch at the bottom of the chart or from any one of the central offices around that ring, that would be a purchase of transport from BellSouth; is that correct?

A. Probably. It doesn't have to be from BellSouth.

Q. Right. No. If they bought it from BellSouth, they would . . .

1 A. If they purchase it from BellSouth. I would hope they
2 would be purchasing it from BellSouth.
3 Q. All right. Mr. Hendrix, were you here when Mr.
4 Holdridge testified this morning?
5 A. Probably at least for some parts of it.
6 Q. All right. I would like to ask you some questions in
7 connection with your interpretation of EEL which is
8 discussed on Page 41 of your rebuttal testimony, and I
9 would like to have you . . .
10 A. Are we finished with this testimony?
11 Q. We're finished with this diagram; yes.
12 A. Yes, sir.
13 Q. We are.
14 MS. FOSHEE:
15 Page what of his rebuttal? I'm sorry.
16 MR. KRAMER:
17 Page 41. I'm sorry.
18 A. Yes, sir, I'm here.
19 Q. All right.
20 MR. KRAMER:
21 Madam Chairman, may I, again, approach the witness
22 just to hand out a diagram?
23 CHAIRWOMAN HELTON:
24 Yes.
25

1 MR. KRAMER:

2 Madam Chairman, may I have this marked as Cross
3 Exhibit 2?

4 CHAIRWOMAN HELTON:

5 Okay.

6 HENDRIX CROSS EXHIBIT 2

7 Q. Mr. Hendrix, would you agree with me that the segment
8 from H to G on this diagram is a loop?

9 A. It's part of a loop, yes, and I'm not trying to be a
10 smart aleck, . . .

11 Q. No. I understand.

12 A. . . . but I'm assuming it would go into the CO and
13 terminate somewhere on the switch and that piece is not
14 shown here.

15 Q. It's not shown here; that's right. It would go into
16 the CO, and it would terminate on a frame and then on a
17 switch?

18 A. Yes, sir.

19 Q. And just recognizing in the diagram that we would then
20 have a cross-connect at the Point F, transport between
21 F and E, and then we would have it coming into a
22 BellSouth Central Office which, on this diagram, is
23 BellSouth Central Office 2.

24 A. Yes, sir, I see that.

25 Q. Now, focusing on the segment that would be from H

1 through G, F, E, C, and D, so that we basically had a
2 loop and a transport that was terminated in an ICG
3 collocation . . . - are you able to follow me?
4 A. Yes, I am.
5 Q. . . . that was terminated in an ICG collocation and
6 that ICG was purchasing this as a special access
7 circuit from BellSouth, . . .
8 A. Yes, sir, I follow you.
9 Q. . . . under the FCC's recently released UNE remand
10 Order, could ICG convert that facility to a UNE
11 combination?
12 A. Well, once the Order is effective. To my knowledge,
13 the Order has not been published in the register yet,
14 and then you would have 30 days from that date to have
15 an effective Order and, at the same time, I believe you
16 would have rules that would actually follow. My
17 understanding is that that would be an arrangement that
18 is existing with an ICG customer that you've currently
19 purchased under the special access tariff and that
20 would likely qualify for a switch as is in that case.
21 Q. So your testimony on Page 41, you're changing your
22 testimony on Page 41 by saying it would qualify
23 whereas, in your testimony on Page 41 in Lines 8 to 14,
24 you, in essence, say that it's unclear whether it would
25 constitute currently combined UNEs?

1 A. Well, no, I think what you heard me say just now is
2 that it would likely. I didn't say that it would, and
3 the word "likely" was used because it is unclear as to
4 what the Order means, the 319 remand, what it actually
5 means relatively to currently combined and that's why I
6 used the word "likely," because we are still trying to
7 understand the Order as to what it means.

8 Q. Well, Mr. Hendrix, if ICG comes to you the day after
9 the Order takes effect and says, "We would like to
10 convert this facility to UNES," will you be ready with
11 an answer then?

12 A. We likely will, and I'm not hedging the answer. You
13 know, we thought we had a final Order. I believe that
14 was issued on November 4 and that it would be published
15 in the Register soon. Well, we just got another Order
16 dated November 24 to supplement that Order. We are
17 likely to get another Order, and what I'm saying is
18 that, if, in fact, we have an Order that is an
19 effective Order, we're going to abide by that effective
20 Order. Granted, we will likely appeal, and we will do
21 some other things, but it's unclear and I'm not certain
22 that the FCC is clear as to what they want to do
23 because the supplemental Order raises many other
24 questions . . .

25 Q. Mr. . . .

1 A. . . . and that was the reason for my answer. I wasn't
2 trying to hedge the answer.

3 Q. No. Mr. Hendrix, were you here this morning when Mr.
4 Holdridge testified as to this earlier?

5 A. Yes, and I think I . . .

6 Q. This was why I asked you. Did you hear Mr. Holdridge
7 say that it is ICG's position that they're going to use
8 the arrangements like the one that appear on what has
9 been marked as Cross Exhibit 2 to provide solely local
10 exchange service?

11 A. Yes, and I believe that was a change from what he had
12 previously offered. I mean, that's all well and good
13 to say that. I'm not certain what that buys. It's
14 like putting a fox in charge of a henhouse . . .

15 Q. I'm sorry?

16 A. . . . and asking us to trust him.

17 Q. I didn't hear what you said.

18 A. Well, I'm sorry. I'm saying I understand that he said
19 that, but I'm not certain what that buys. It's like
20 putting a fox in charge of a henhouse, with all the
21 problems we've had with usage and jurisdictional usage
22 with customers wanting us to bill them appropriate
23 usage. I understand that he says that, but, you know,
24 he just said that, but it's different from what he
25 filed.

- 1 Q. Well, so you don't think that's a real commitment; is
2 that what I'm hearing you say?
- 3 A. No, I'm not going to go that far. It's just that I'm
4 uncertain as to what he meant. I mean, I understand
5 him saying that he will use it strictly for local, and
6 it will not be used for special access. I mean, that's
7 okay but it's different from what was filed.
- 8 Q. Well, I understand but he changed what was filed.
- 9 A. Yes, sir, I understand that.
- 10 Q. So now we know that ICG's policy is that it will use
11 this only for local exchange service, and my question
12 is does that at all affect your answer?
- 13 A. No, it does not. My answer is to clarity of the Order
14 and whether or not, before the Order that was issued on
15 November 4 and then the follow-up Order, supplemental
16 Order on the 24th - I believe those are the dates -
17 whether or not they will be supplemented again. So
18 there's just some unclear things that we would have to
19 do, but, once the Order is effective, we will abide by
20 that Order, and we will make a choice as to what it is
21 that we think the Order obligates us to actually do,
22 but I cannot sit here and tell you now, with clarity,
23 that that's what we will do, because I do not
24 understand the Order totally.
- 25 Q. And so you're saying - Mr. Hendrix, I'll tell you, I'm

1 really taken back by this. So you're saying it is
2 BellSouth's policy that, even where you have a clear
3 commitment that an existing special access circuit will
4 not be used for local exchange service, you won't -
5 once the FCC's Order is effective, you're still not
6 clear whether you're going to convert that to UNES?
7 A. No, sir, that's not what I'm saying. I'm saying, as I
8 stated at Page 41, I believe, starting at Line 8,
9 BellSouth is determining exactly what the Order
10 obligates us to, and, if we are required to convert
11 those circuits that are currently special access
12 terminating into a collocation space that has the loop
13 and the transport elements as the two elements and if
14 we're obligated to do so, then we're going to abide by
15 the Order, and we're going to do it. With the
16 supplemental Order that has come out, it did not add
17 clarity.
18 Q. But the . . .
19 A. It actually . . .
20 Q. Excuse me.
21 A. I'm sorry. It actually made it more unclear, but we
22 will abide by the Order, and we will do whatever we
23 have to do to be in compliance with that Order.
24 Q. But wasn't the supplemental Order designed to make it
25 clear that the FCC was cutting back on the ability to

1 use existing combinations for exchange access, and
2 hasn't ICG renounced its use of this facility for an
3 exchange access? Isn't it true that's what the
4 supplemental Order did?

5 A. That's what it attempted to do; yes. I would agree
6 with that, and I understand that ICG has offered not to
7 use EELs for anything other than true local traffic.

8 Q. Well, just so the record is clear, let me just go to
9 the next hypothetical, although I think I know the
10 answer. Let's assume that there is an existing
11 facility, an existing customer of BellSouth's on the
12 facility between H, G, F, E, C, A, B so that we have a
13 termination into the BellSouth switch in BST Central
14 Office 2 where ICG is also collocated. Okay?

15 A. Yes, sir.

16 Q. And let's assume that the service that BellSouth is
17 offering here is the use of this facility to provide
18 the ANSA service, in other words, to provide ISDN
19 support for the customer premises here, H, out of a
20 central office where the end office doesn't serve the
21 customer and that's the service Mr. Holdridge referred
22 to this morning when he said BellSouth uses EELs; do
23 you recall that?

24 A. No, I do not.

25 Q. Well, then assume with me, if you will, you're familiar

1 with ANSAs or with providing ISDN support from . . .

2 A. Yes, I am.

3 Q. Okay. So just assume with me that's what this facility

4 is doing, and now assume with me that that same

5 BellSouth customer says to BellSouth that it wants to

6 change to ICG and would BellSouth simply take the

7 cross-connect, which is the link shown here that would

8 be A, B, and cut off the tail between C and A, and move

9 the cross-connect so that it terminates in the ICG

10 collo at D. So, in essence, we would cut off the C, A,

11 B function link, and the cross-connect would just be

12 moved over to the ICG collo. Would you regard that as

13 an existing facility?

14 A. Do you mean as a switch as is or currently combined?

15 Q. Yes, as a switch as is.

16 A. No, I would not because, while the Order is unclear,

17 what I understand "currently combined" to mean is that

18 BellSouth would have to have an end user that's

19 purchasing a special access terminating in an ICG

20 collocation space, and, to my knowledge, we do not have

21 that.

22 Q. You mean in the hypothetical I just gave?

23 A. That's correct.

24 Q. Yeah. So you would regard, though, even though the

25 combined loop and transport, what ICG is calling the

1 EEL, is coming to the same central office, and all ICG
2 is asking you to do is to move a cross-connect from the
3 BellSouth switching to the ICG collo, you would not
4 regard the combined transport and loop in that
5 situation as an existing facility?

6 A. No, it does not exist because that customer is a
7 BellSouth end-user customer, and we do not have an
8 arrangement for a BellSouth end-user customer that's
9 purchasing special access to terminate into an ICG
10 collocation arrangement.

11 Q. Mr. Hendrix, wouldn't your position have the effect of
12 preventing ICG from competing on an efficient basis for
13 that customer?

14 A. No, sir, I don't believe it will; no.

15 Q. Okay. Now, just one last question on the diagram or
16 it's actually something you referred to - well, let me
17 ask you, Mr. Hendrix, do you happen to have the FCC's
18 UNE remand Order with you?

19 A. No, sir. I have the supplemental. I did not bring the
20 larger Order.

21 MR. KRAMER:

22 Madam Chairman, may I approach the witness?

23 CHAIRWOMAN HELTON:

24 Yes. Are you finished with this Exhibit that we
25 marked?

1 MR. KRAMER:

2 Yes.

3 CHAIRWOMAN HELTON:

4 Do you want to move it into the record?

5 MR. KRAMER:

6 Yes, please, I would like to move it into the
7 record.

8 CHAIRWOMAN HELTON:

9 So ordered.

10 MR. KRAMER:

11 Thank you, Madam Chairman.

12 HENDRIX CROSS EXHIBIT 2

13 CHAIRWOMAN HELTON:

14 Mr. Kramer, do you have much more for this
15 witness?

16 MR. KRAMER:

17 I would say 15-20 minutes.

18 CHAIRWOMAN HELTON:

19 Okay. I believe we need to take a break. We'll
20 take a 15 minute break.

21 MR. KRAMER:

22 All right. Thank you, Madam Chairman.

23 OFF THE RECORD

24 CHAIRWOMAN HELTON:

25 Mr. Kramer?

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MR. KRAMER:

Thank you, Madam Chairman.

Q. Mr. Hendrix, could we just go back to Cross Exhibit No. 2, this diagram, for just one or two quick questions? Will you agree with me that the transport terminates at an entrant's facility at the letter E as in Edward?

A. No, sir, I would not.

Q. Where would it terminate?

A. The transport, in this case, that is an inner office transport because it's going between Central Office 1 and Central Office 2 prior to going into the collocation space. It's probably on a DSX type panel or something of that nature.

Q. Or DACS, something of that sort?

A. Yes, sir.

Q. And that would be, let's say, at C, something of that sort?

A. Around C, yes, somewhere in that area.

Q. Somewhere just inside the central office?

A. Yes, I would agree.

Q. Okay. Thank you.

MR. KRAMER:

Madam Chairman, you had just allowed me to approach the witness.

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CHAIRWOMAN HELTON:

Yes. Yes. Okay.

MR. KRAMER:

Thank you.

Q. Mr. Hendrix, I'm showing you Section 319(a)(1) and that is the definition of local loop. Could you just read the first sentence of the definition?

A. Yes, sir. "The local loop network element is defined as a transmission facility between a distribution frame ... in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC."

Q. Mr. Hendrix, subject to check, would you agree with me that the definition of loop that you just read is similar to the definition of loop that's contained in the current interconnection agreement that ICG and BellSouth are negotiating?

A. Subject to check. I mean, there are various loops, but, subject to check, yes, sir.

Q. Yeah. But isn't this the general definition of a loop or it looked like the general definition of a loop contained in your template?

A. Yes, I would agree.

Q. Yeah.

A. Yes, I would agree.

- 1 Q. Okay. Mr. Hendrix, could I ask you to look at Pages 34
2 and 35 of your direct testimony?
- 3 A. Yes, sir, I'm here.
- 4 Q. Several places in this area, for example on Line 20 of
5 Page 34, you refer to ISPs as carriers, again, in the
6 "Q," beginning on Line 7 of Page 35, and carrying over
7 into the answer, "Why is the fact that ISPs are
8 carriers . . ." in the "Q" and then "The fact that ISPs
9 are carriers . . ." in the first line of the answer.
10 Can you tell me where the FCC has ever said that ISPs
11 are carriers?
- 12 A. I believe there are references dating back to the '83
13 Order where the FCC mentioned that ISPs, which they are
14 a subset of ESPs, like carriers, provide interstate
15 services, and I think it's from those inferences. I
16 can't remember right offhand if the word "carrier" is
17 actually used, but it was in the carrier context.
- 18 Q. But you say it's important to your analysis that they
19 are carriers?
- 20 A. Yes, sir, because they are, in fact, providing access
21 services but they are allowed to not be assessed access
22 charges for a period of time which access charges are,
23 in fact, assessed to carriers, and the FCC has exempted
24 them from this access charges for this interim period.
- 25 Q. It's true that the FCC has exempted them from access,

1 but can you cite me anywhere where the FCC has actually
2 said they're carriers?
3 A. I cannot readily put my hand on it; no, sir.
4 Q. Isn't it true that enhanced service providers, of which
5 ISPs are one class, are not regulated like carriers?
6 A. I would agree that they are not at this moment because
7 the point that I just made as to the fact that they do
8 not pay access charges would indicate there that they
9 are, in fact, not regulated like carriers, but they do,
10 in fact, provide access services through the ISP type
11 offerings that they have, but they are exempt from
12 access charges.
13 Q. But, Mr. Hendrix, if you say it's important that they
14 are carriers, surely you must have some authority for
15 the proposition that they are carriers.
16 A. And I do not have anything here that I could readily go
17 back in and reference; I'm sorry.
18 Q. You would agree with me they're enhanced service
19 providers?
20 A. Oh, yes, sir, I would agree with that; right.
21 Q. And you would agree that enhanced service providers are
22 not regulated like carriers?
23 A. I would agree with that; yes, sir.
24 Q. Mr. Hendrix, I want to just turn to one last portion of
25 your testimony, which I can't seem to locate. I know

1 and Order, I believe it's Paragraph 1090, it speaks to
2 the application of the rates, are the words that are
3 stated here, and, to paraphrase those, what it states
4 is that a tandem switch will provide trunk-to-trunk -
5 three functions, I believe it is. There's trunk-to-
6 trunk, trunk-to-line, as well as serve the same
7 geographic area, and I believe you will find that in
8 Paragraph 1090 of the First Report and Order. Also, I
9 believe, in the 319(c)(2), it states the functions that
10 a local tandem switch is to actually offer or provide.
11 So I think it's very clear in those two cites as to
12 what is meant here by 51.711.

13 Q. But you would agree with me there's no mention of it in
14 the FCC's rule?

15 A. There's no mention of it here, but it is in the
16 319(c)(2) and Paragraph 1090 of the First
17 Report . . .

18 Q. But 319 - excuse me.

19 A. . . . and Order, but there is no mention here.

20 Q. And 319(c)(2), of course, doesn't speak to reciprocal
21 compensation. It only speaks to tandem functions;
22 isn't that correct?

23 A. I would have to go back and look, but I know that it
24 defines the functions, definitely.

25 Q. Defines the tandem functions?

1 A. Definitely, yes.

2 Q. But it doesn't speak to reciprocal compensation?

3 A. It may not. I would have to go back and check.

4 MR. KRAMER:

5 Madam Chairman, I have just one more housekeeping
6 matter. I referred several times to ANSA, and I
7 realize I may not have described that acronym.
8 Just for the record, it is alternate network
9 serving arrangement, ANSA, and I would like to
10 submit as a Cross Exhibit, because we did refer to
11 it, the page from the BellSouth tariff where that
12 is referenced. It's Tariff 2A, Third Revised Page
13 25.

14 CHAIRWOMAN HELTON:

15 So ordered.

HENDRIX CROSS EXHIBIT 5

17 MR. KRAMER:

18 And, Madam Chairman, I think we need to mark the
19 rule that I handed him as an Exhibit also, and I
20 would move its admission.

21 CHAIRWOMAN HELTON:

22 So ordered.

HENDRIX CROSS EXHIBIT 3

24 MR. KRAMER:

25 And I have nothing further at this time.

1 CHAIRWOMAN HELTON:
2 Ms. Dougherty?

3 MS. DOUGHERTY:
4 No questions.

5 CHAIRWOMAN HELTON:
6 Redirect?

7 MS. FOSHEE:
8 Three quick redirect questions.

9
10 REDIRECT EXAMINATION

11 BY MS. FOSHEE:

12 Q. Mr. Hendrix, Mr. Kramer talked to you some about the
13 issue of ISPs as carriers. The FCC exempted ISPs from
14 paying access charges; correct?

15 A. That is correct.

16 Q. And, presumably, the only reason the FCC needed to
17 exempt them from paying access charges is because, as
18 carriers, they otherwise would pay access charges; do
19 you agree with that?

20 A. That's my understanding; that's correct.

21 Q. Okay. Then, back at the beginning of his cross
22 examination, Mr. Kramer talked to you about your
23 Diagrams B and F and whether reciprocal compensation
24 for ISP-bound traffic was appropriate. What does
25 BellSouth want this Commission to do with respect to

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ISP-bound traffic?

A. What I would offer, and I offer three options, but the option that I think is appropriate, since the FCC is going to address this issue, and we understand they will address it soon, - there's a lot of pressure for them to address this issue - is to simply order the parties to track and then to implement whatever is in the Order. So no money would actually exchange hands, and we just track it. That's the simplest thing to actually do and just wait for the federal Order.

MS. FOSHEE:

Chairman Helton, I have no further questions.
Thank you.

CHAIRWOMAN HELTON:

Thank you.

MR. KRAMER:

Just one, Madam Chairman.

RE CROSS EXAMINATION

BY MR. KRAMER:

Q. Mr. Hendrix, isn't it accurate that, in the Notice of Proposed Rulemaking issued in connection with the FCC's Declaratory Order last February, that the FCC's tentative conclusion was that the FCC was going to

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delegate to the states the job of determining the reciprocal compensation rate under the Section 252 arbitrations?

A. No, I don't read it that way.

MR. KRAMER:

Madam Chairman, I had hoped it was the last time. May I approach the witness . . .

CHAIRWOMAN HELTON:

Yes.

MR. KRAMER:

. . . one more time?

HENDRIX CROSS EXHIBIT 4

MR. KRAMER:

For the record, I've handed Mr. Hendrix the FCC's Declaratory Ruling of February 26, 1999. It is in CC Docket No. 96-98. The document number is FCC 99-38.

Q. Mr. Hendrix, could I ask you to read the first sentence of Paragraph 30?

A. Paragraph 30?

Q. Yes.

A. "We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements

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negotiated and arbitrated under sections 251 and 252 of the Act."

Q. And could you just read the next sentence as well? I'm sorry.

A. Yes. "Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts."

MR. KRAMER:

Madam Chairman, I have nothing further.

CHAIRWOMAN HELTON:

Thank you.

MR. KRAMER:

May I, just as a housekeeping matter, mark this and move it in?

CHAIRWOMAN HELTON:

So ordered.

MR. KRAMER:

There must be hundreds of these in your records by now.

CHAIRWOMAN HELTON:

Yes. One on my desk.

HENDRIX CROSS EXHIBIT 4

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MR. KRAMER:

Madam Chairman, before we close, I do, again, want to apologize publicly to Mr. Hendrix for my repeated lapses here. I'm very, very sorry.

A. I honestly was not bothered by it. Thank you so much.

CHAIRWOMAN HELTON:

You will give our regards to Mr. Varner? I do believe that the parties' best and final offers are due 20 days after this hearing, which would be the 22nd. I would ask if the parties believe that they need to do briefs. If so, we will set a date when those briefs are due.

MR. KRAMER:

Madam Chairman, we would like to submit a brief.

MS. FOSHEE:

As would we.

MS. DOUGHERTY:

Simultaneous?

MS. FOSHEE:

I think simultaneous with one brief.

CHAIRWOMAN HELTON:

When will the transcript . . .

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MS. DOUGHERTY:

It's supposed to be due 20 days - by Order, it's already set to be due 20 days from today, which makes it December 22.

CHAIRWOMAN HELTON:

He was only referring to the briefs.

MR. KRAMER:

I was only referring to the briefs . . .

MS. DOUGHERTY:

Okay.

MR. KRAMER:

. . . but it's fine with us if you want to push back the best and final and the other, too.

CHAIRWOMAN HELTON:

No.

MR. KRAMER:

Oh!

CHAIRWOMAN HELTON:

We would like the best and final as they were due. We will give you an extension for the holidays on the briefs, and they will be due January 14. Then our Order will be moved by exactly that many days.

1 MS. DOUGHERTY:

2 From the 22nd to the 14th?

3 CHAIRWOMAN HELTON:

4 Yes.

5 MS. DOUGHERTY:

6 Okay.

7 CHAIRWOMAN HELTON:

8 Well, from the extension that we've given. It was
9 due the 27th, and we've given them until the 14th,
10 so whatever that date comes out - I don't have a
11 February calendar here - is when our Order will be
12 due on this. Are there any other matters to come
13 before the Commission? Hearing none, we're
14 adjourned.

15 MS. FOSHEE:

16 Thank you.

17 MR. HATFIELD:

18 Thank you.

19 OFF THE RECORD

20 MS. DOUGHERTY:

21 We understand that the transcript will be filed
22 December 17, and the best and final offers,
23 including contract language as described in the
24 Commission's Procedural Order, are due December
25 22. The parties have agreed to furnish the late-

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filed material by that date as well. The briefs will be filed no later than January 14, 2000, and, by mutual consent, both parties have agreed that the Commission's statutory deadline is February 24, 2000.

MR. HATFIELD:

That's correct.

FURTHER THE WITNESSES SAITH NOT
HEARING ADJOURNED
OFF THE RECORD

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STATE OF KENTUCKY
COUNTY OF FRANKLIN

I, Connie Sewell, the undersigned Notary Public, in and for the State of Kentucky at Large, do hereby certify the foregoing transcript is a complete and accurate transcript, to the best of my ability, of the hearing taken down by me in this matter, as styled on the first page of this transcript; that said hearing was first taken down by me in shorthand and mechanically recorded and later transcribed under my supervision; that the witnesses were first duly sworn before testifying.

My commission will expire November 19, 2001.

Given under my hand at Frankfort, Kentucky, this the 17th day of December, 1999.

Connie Sewell
Connie Sewell, Notary Public
State of Kentucky at Large
1705 South Benson Road
Frankfort, Kentucky 40601
Phone: (502) 875-4272

FILED

DEC 17 1999

PUBLIC SERVICE
COMMISSION

EXHIBITS

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:)	*<u>PROPRIETARY VERSION</u>*
)	
Petition by ICG Telecom Group, Inc.)	SUPPLEMENTAL TESTIMONY
for Arbitration of Interconnection)	OF MICHAEL STARKEY ON
Agreement With BellSouth)	BEHALF OF ICG TELECOM
Telecommunications, Inc. Pursuant)	GROUP, INC.
To Section 252(b) of the)	
Telecommunications Act of 1996)	

- 1 **Q.** Please state your name.
- 2 **A.** My name is Michael Starkey.
- 3
- 4 **Q.** Are you the same Michael Starkey who has previously filed both direct and rebuttal
- 5 testimony in this proceeding?
- 6 **A.** Yes, I am.
- 7
- 8 **Q.** What is the purpose of your Supplemental Testimony?
- 9 **A.** My Supplemental Testimony responds directly to the Commission's June 16, 1999 *Order*
- 10 *Concerning Interim Proposals for Compensation*. In its June 16 *Order* the Commission
- 11 asked that both ICG and BellSouth apply "creative thinking" to the issue of compensation
- 12 for ISP-bound traffic. My supplemental testimony, in response to the Commission's request
- 13 that ICG "...present its best proposal for such mechanism when it files its rebuttal

PPAB-RAI/109558.1



1 testimony....";¹ incorporates a reciprocal compensation mechanism that meets the
2 Commission's directive.

3
4 **Q. How is ICG responding to the Commission's directive to be creative?**

5 **A. In the spirit of the Commission's directive, I will not reiterate the many points included in**
6 **both my direct and rebuttal testimony describing why the current reciprocal compensation**
7 **rates included in the Interconnection Agreement are a reasonable starting point for the**
8 **compensation of both voice and ISP-bound traffic. I include one of those proposals in this**
9 **supplemental testimony. I explain ICG's proposal in the remainder of my testimony. It**
10 **should be noted that while ICG believes the proposal is economically sound, ICG does not**
11 **necessarily agree with each assumption used in the analysis. Many of these assumptions are**
12 **included simply to be responsive to the Commission's mandate and in an attempt to reach**
13 **resolution of this issue. As I describe the proposal I will attempt to highlight for the**
14 **Commission areas where ICG may be including an assumption with which it may not**
15 **completely agree.**

16
17 **Q. Please summarize the main points of your testimony.**

18 **A. The purpose of my testimony is to describe ICG's "Adjusted Call Length" (ACL) proposal.**
19 **The purpose of the ACL proposal is to produce a reasonable rate that can be used by ICG**
20 **and its interconnecting carriers to compensate one another for all types of traffic exchange,**
21 **including both voice traffic and traffic bound for ISP providers.**

22
23 **Q. Please describe the ACL proposal.**

24 **A. The ACL proposal responds to arguments made by incumbent local exchange carriers from**
25 **around the country regarding the inability of traditional voice-call cost models to accurately**
26 **capture the per minute costs associated with ISP-bound traffic. More specifically, the ACL**

¹ On July 14, 1999 the Commission issued an *Order Extending Time* thereby establishing July 22, 1999 as the date by which ICG should file testimony explaining the results of its creative thinking.

1 proposal is based on the recognition that calling patterns are changing as traffic bound for
2 the Internet and other factors have tended to increase the length of the average switched call.
3 In recognition of this calling pattern shift, the ACL proposal is meant to "update" traditional
4 switching cost study methodologies for purposes of recognizing longer switch holding times.
5 The ACL accomplishes this task by "spreading" call *Setup Costs* across a longer average call
6 *Duration*, thereby arriving at per minute costs more indicative of today's actual traffic
7 requirements.

8
9 **Q. Describe "Setup Costs;" how are they relevant to ICG's ACL proposal?**

10 **A.** Within both BellCore's *Switching Cost information System (SCIS)* and other traditional
11 models that measure switched usage², costs, switching costs are calculated on a per-minute-
12 of-use basis. These per-minute-of-use costs are calculated using two categories of expenses:
13 (1) *Setup Costs* and (2) *Duration Costs*. *Setup Costs* attempt to identify and capture the
14 expenses associated with establishing a circuit necessary to both route, and ultimately
15 connect, the calling party with his/her called number. *Duration Costs* attempt to identify and
16 capture the expenses that result from the circuit remaining open during the duration of a call.
17 *Set-Up* costs, therefore, are by nature "per call" costs; meaning they are incurred only once
18 per call. *Duration* costs, on the other hand, are incurred per unit of time for which the call
19 remains established and are generally measured per "minute of use."

20
21 Given the per-call and per-minute cost structure underlying switched usage, in order to arrive
22 at average, per-minute-of-use costs ILECs have traditionally "spread" *Setup Costs* over the
23 duration of an average call. By spreading *Setup Costs* in this way, it is possible to arrive at
24 an average per minute rate that can be reasonably applied to each minute a call is connected;
25 avoiding the need to establish the expensive systems necessary to differentiate between the
26 initial and subsequent minutes of a call. The following equation generally captures the
27 process by which this "spreading" is accomplished:

1 2 These are the types of cost models upon which the vast majority of incumbent local
2 exchange carriers, including BellSouth, rely to measure switched usage costs.

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$$\frac{[\textit{Set-Up Costs} + (\textit{average length of call in minutes} \times \textit{Duration Cost per minute})]}{\textit{average length of call in minutes}}$$

Simply put, the formula above "spreads" per call *Set-Up Costs* over the duration of an average call to arrive at a single, per minute of use cost.

Q. How are *Set-Up Costs* and *Duration Costs* relevant to the *ACL* proposal?

A. Throughout the debate surrounding proper compensation for ISP-bound traffic incumbent local exchange carriers have argued that calls made to ISP providers are, on average, longer than traditional local, voice calls. Because of this they've argued that the costs associated with these calls aren't properly calculated by using the traditional switched usage models.³ Also, because the traditional models assume an "average length of call" in their calculation (and that average length of call has generally been assumed to be approximately 3 to 4 minutes in length compared to the approximately 20 minutes in length for an average ISP bound call), ISP calls recover more "Set Up" cost than they actually generate.

For example, assume a traditional voice call has an average duration of 3.5 minutes. Also assume that, on average, set up costs are \$0.001 per call and duration costs are \$0.004 per minute. Using these assumptions, an average voice call would generate the following costs:⁴

1 See BellSouth *Reply Comments*, April 27, 1999 in FCC C.C. Docket No. 99-68, at
2 page 7, included with the *Direct Testimony* of Mr. Varner.
3
4 While the numbers used in the numerical example above are merely assumptions used
5 to illustrate the "spreading" concept, the relationship between the setup costs and the
6 duration costs (i.e. set up costs represent approximately 40% of the entire cost of the
call), is a relatively accurate assumption given the cost information we have seen from
across the country (including BellSouth).

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TRADITIONAL VOICE	
Average length of call	3.5 Minutes
Setup cost per call	\$0.01
Duration cost per	\$0.004
<u>[setup costs + (avg. length of call x duration cost per min.)]</u>	
average length of	
<u>[\$0.01 + (3.5 x</u> = \$0.0069 per minute	
3.5	

In the past, the \$0.0069 per minute resulting from the analysis above has simply been considered an average cost per minute of use. If we applied this \$0.0069 per minute to a 20 minute call, however, we would arrive at a total compensation of \$0.138. Our total cost of the call would be only \$0.09.¹ The difference results from the fact that we recover \$0.01 of setup costs every 3.5 minutes (approximately 6 times in a 20 minute call).

- Q.** How does the *ACL* proposal address the issue stated above?
- A.** The *ACL* option simply alters traditional switched usage cost models in response to arguments regarding the potentiality of longer average holding times. The *ACL* alters the traditional model simply by updating the "average length of call" while continuing to rely upon investment and expense information specific to the switching platform of the incumbent LEC in question. For example, relying upon BellSouth's TELRIC documentation in North Carolina, the *ACL* proposal yields a rate of \$0.0048. That rate is calculated as follows:

¹ , 20 x \$0.0069 = \$0.138, (\$0.01 + (20 x \$0.004)) = \$0.09

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TABLE 2

<u>VOICE CALL</u>		<u>Source</u>
Standard voice call length (in minutes)	3.3	BST's Switched Network
Cost of Standard voice call, per minute	\$0.0070	BST / ICG Intercon. Agreement
Total cost of Standard voice call	\$0.0231	ln 1 x ln 2
ratio of setup cost to duration cost	37.95%	BST's Switched Network
cost of setup	\$0.0088	ln 3 x ln 4
Cost per minute (duration)	\$0.0043	(ln 3 - ln 5) / ln 1
<u>ISP CALL</u>		<u>Source</u>
Standard internet call length (in minutes)	20	Input
Total cost of Standard Internet call	\$0.0956	(ln 6 x ln 9) + ln 5
Cost of Standard internet call, per	\$0.0048	ln 10 / ln 9

Q. Please explain the analysis above.

A. The analysis above simply applies the "spreading" equation identified earlier, using a 20 minute call (a call length more likely to represent the calling characteristics of an average ISP-bound call). The analysis above continues to rely upon information from BellSouth's cost studies in arriving at a per minute rate more reflective of the underlying costs BellSouth and other carriers would incur in carrying an ISP-bound call. BellSouth's most recently approved cost studies rely upon an average call length of 3.3 minutes and a ratio of Setup investment / Duration investment of 37.95%. The analysis above simply extends the "average call length" from 3.3 minutes to 20 minutes and "spreads" the Setup costs of the call over this longer holding time.⁶

The \$0.0048 rate that results from using ACL option represents a nearly 33% reduction in the per-minute rate for ISP-bound traffic when compared to the \$0.007 rate currently included in the Interconnection Agreement.

Q. Why is the ACL option preferable to other solutions?

1 See BellSouth's *Switched Network Calculator* support material at Bates stamped
2 pages 001456 through 001465.

1 A. First, the ACL recognizes that each carrier incurs some level of cost when its network
2 is used to carrying a call originated by another carrier. Hence, some level of
3 compensation must be paid. Any proposal that this Commission or the FCC ultimately
4 decides upon should not ignore the fundamental economic concept that costs should be
5 recovered from the cost causer (i.e., the carrier originating the call).

6
7 The ACL option is based on a reasoned economic theory that has been in use for many
8 years. That is, a local exchange carrier incurs two distinct types of costs when a call is
9 carried on its switching platform: setup costs and duration costs. Likewise, the ACL
10 option recognizes the following facts and incorporates more precise information in using
11 those facts to arrive at reasonable rates. For example, in an effort to avoid unnecessary
12 complexity (and costs) in the billing system and in marketing switched usage products,
13 a single, per minute rate is preferred. The most efficient way in which to arrive at a per
14 minute rate of compensation is to recover set up costs that occur only once per call by
15 recovering a portion of those setup costs for each minute in which the call is connected.
16 This is accomplished by spreading setup costs across the average length of call. ISP-
17 bound traffic and other changes in the telecommunications industry have tended to
18 increase the average length of call. Today's reciprocal compensation rates may not have
19 captured these increased call volumes as precisely as they could have because they are
20 based upon aged traffic data. The ACL option uses more recent traffic data in an effort
21 to more accurately identify per minute of use costs specific to today's calling patterns.
22 Using this process, the ACL option results in cost-based compensation rates that are
23 equally applicable to voice, data and all other types of switched traffic.

24
25 **Q. How would the ACL option be included in the agreement between BellSouth and**
26 **ICG?**

27 A. The ACL option would be included in the agreement simply by adopting a reciprocal
28 compensation rate of \$0.0048 for both voice-grade and ISP-bound calling. The \$0.0048
29 rate is determined consistent with the theory of the ACL option as it has been described
30 above.

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Q. In your example above you used an average call length of 20 minutes. Are you suggesting that the average length of call—if traditional call holding times were updated—would be 20 minutes?

A. I am not. In fact, ICG by proposing the ACL is in no way suggesting that the 3.3 minutes per average call currently included in BellSouth's cost studies is necessarily inaccurate. While ISP bound calling and other factors may be increasing the length of an average call, these types of calls still constitute a small portion of the entirety of traffic the switching network manages. As such, it is likely that if the average length of call has increased, it has increased only marginally. It is likely that if BellSouth were required to sample its current traffic patterns to determine an updated average-call-length for use within its cost studies, a call length substantially below the 20 minutes we've assumed above would result. The actual, shorter average-call-length likely to result from such a study would raise the per minute rate of compensation resulting from application of the ACL proposal.

Q. If you believe that the actual, average call holding time is substantially less than 20 minutes, and if using the 20 minute assumption lowers the per minute rate of compensation ICG would receive, why are you recommending the Commission rely upon a rate that uses the 20 minute assumption?

A. In an effort to be as conservative as possible, I assumed an average call holding time of 20 minutes in arriving at the \$0.0048 rate. Indeed, the 20 minute average call length example I used in my analysis above assumes that nearly 100% of all calls passed between carriers are calls bound for ISPs. While this is certainly not the case, such an assumption ensures that ICG will not be "overcompensated" for such traffic and reflects an effort on ICG's part to be as reasonable as possible. In addition, using an overly conservative average call length of 20 minutes should negate the need to update the analysis prior to the FCC and this Commission deciding upon a more permanent compensation mechanism (even if it is assumed that average call holding times are increasing). Further, by using an overly conservative assumption, it is ICG's hope to

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minimize the need for BellSouth to undertake what would likely be a somewhat time consuming analysis of its actual call patterns for purposes of arriving at a more precise (yet likely lower) average call holding time. Given that the ACL option is being considered as an interim solution by the Commission, ICG hopes that by using an overly conservative assumption, the Commission will be able to approve the rate that results from the ACL analysis and not require time consuming studies that would slow payment of reciprocal compensation due between the parties.

Q. Other than its basis in sound economic theory, are there other public policy benefits that would result from the Commission adopting the ACL proposal?

A. There are. Because the ACL option compensates carriers for costs they incur, in a manner consistent with the way in which those costs are incurred, adopting the ACL proposal would foster all of the public policy benefits I described in my direct testimony.

Q. Does this conclude your testimony?

A. It does.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 96-262
)	
Price Cap Performance Review for Local Exchange Carriers)	CC Docket No. 94-1
)	
Transport Rate Structure and Pricing)	CC Docket No. 91-213
)	
End User Common Line Charges)	CC Docket No. 95-72
)	

FIRST REPORT AND ORDER

Adopted: May 7, 1997

Released: May 16, 1997

Comment Date: June 26, 1997

Reply Date: July 11, 1997

By the Commission: Commissioners Quello, Ness, and Chong issuing separate statements.

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12 FCC Rcd 15982 (1997)

and terminate interstate calls, ISPs should not be required to pay interstate access charges.⁴⁹⁹ In recent years, usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly.⁵⁰⁰ Although the United States has the greatest amount of Internet users and Internet traffic, more than 175 countries are now connected to the Internet.⁵⁰¹ As usage continues to grow, information services may have an increasingly significant effect on the public switched network.

342. As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.⁵⁰² The business line rates are significantly lower than the equivalent interstate access charges, given the ISPs' high volumes of usage.⁵⁰³ ISPs typically pay incumbent LECs a flat monthly rate for their connections regardless of the amount of usage they generate, because business line rates typically include usage charges only for outgoing traffic.

343. In the *NPRM*, we tentatively concluded that ISPs should not be required to pay interstate access charges as currently constituted. We explained that the existing access charge system includes non-cost-based rates and inefficient rate structures. We stated that there is no

on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional different, or restructured information; or involve subscriber interaction with stored information." The 1996 Act defines "information services" as offering the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). For purposes of this order, providers of enhanced services and providers of information services are referred to as ISPs.

⁴⁹⁹ MTS and WATS Market Structure, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (*Access Charge Reconsideration Order*). See also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*).

⁵⁰⁰ The number of U. S. households with Internet access more than doubled over the past year, and approximately 38.7 million Americans over the age of 18 have accessed the Internet at least once. Jared Sandberg, "U.S. Households with Internet Access Doubled to 14.7 Million in Past Year, *Wall Street Journal*, October 21, 1996, at B11.

⁵⁰¹ Network Wizards Internet Domain Survey, January 1997, available on the World Wide Web at <<http://www.nw.com/zoneWWW/top.html>>.

⁵⁰² *ESP Exemption Order*, 3 FCC Rcd at 2631 nn.8, 53. To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.

⁵⁰³ CIEA Comments at 5-6.

reason to extend such a system to an additional class of customers, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry. We explained that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers.⁵⁰⁴ We solicited comment on the narrow issue of whether to permit incumbent LECs to assess interstate access charges on ISPs.⁵⁰⁵ In the companion *Notice of Inquiry (NOI)*, we sought comment on broader issues concerning the development of information services and Internet access.⁵⁰⁶

2. Discussion

344. We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs. We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry⁵⁰⁷ and advances the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."⁵⁰⁸

345. We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXC. Commercial Internet access, for example, did not even exist when access charges were established. As commenters point out, many of the characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers.

346. We also are not convinced that the nonassessment of access charges results in

⁵⁰⁴ NPRM at para 288.

⁵⁰⁵ *Id.*

⁵⁰⁶ See *In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, Notice of Inquiry, FCC 96-488 (rel. December 24, 1996) (*NOI*).

⁵⁰⁷ See, e.g., CompuServe/Prodigy Comments at 11; Information Industry Association Comments at 4; Minnesota Internet Services Trade Association Reply at 1.

⁵⁰⁸ 47 U.S.C. § 230(b)(2).

ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.

347. Finally, we do not believe that incumbent LEC allegations about network congestion warrant imposition of interstate access charges on ISPs.⁵⁰⁹ The Network Reliability and Interoperability Council has not identified any service outages above its reporting threshold attributable to Internet usage, and even incumbent LEC commenters acknowledge that they can respond to instances of congestion to maintain service quality standards. Internet access does generate different usage patterns and longer call holding times than average voice usage. However, the extent to which this usage creates congestion depends on the ways in which incumbent LECs provision their networks, and ISPs use those networks. Incumbent LECs and ISPs agree that technologies exist to reduce or eliminate whatever congestion exists; they disagree on what pricing structure would provide incentives for deployment of the most efficient technologies.⁵¹⁰ The public interest would best be served by policies that foster such technological evolution of the network. The access charge system was designed for basic voice telephony provided over a circuit-switched network, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services.

348. Thus, in our review of the record filed in response to the *NOI*, we will consider solutions to network congestion arguments other than the incumbent LECs' recommendation that we apply access charges to ISPs' use of circuit-switched network technology. We intend rather to focus on new approaches to encourage the efficient offering of services based on new network configurations and technologies, resulting in more innovative and dynamic services than exist today. In the *NOI*, we will address a range of fundamental issues about the Internet and other information services, including ISP usage of the public switched network.⁵¹¹ The *NOI* will give us an opportunity to consider the implications of information services more broadly, and to craft proposals for a subsequent NPRM that are sensitive to the complex economic, technical, and legal questions raised in this area. We therefore conclude

⁵⁰⁹ See, e.g., USTA Comments at 81-82.

⁵¹⁰ SWBT Comments at 20; PacTel Reply at 26; Internet Access Coalition Reply at 11-12; America On-Line Reply at 7-9.

⁵¹¹ In particular, we requested data about alleged network congestion, rates paid by ISPs today, alternative network access technologies, and additional services desired by ISPs. *NOI* at ¶¶ 313-317.

that ISPs should remain classified as end users for purposes of the access charge system.

C. Terminating Access

349. In the NPRM, we requested comment regarding the regulation of terminating access. We noted that, unlike originating access, the choice of an access provider for terminating access is made by the recipient of the call. The call recipient generally does not pay for the call and, therefore, is not likely to be concerned about the rates charged for terminating access. We suggested that neither the originating caller nor its long-distance service provider can exert substantial influence over the called party's choice of terminating access provider.⁵¹² Thus, even if competitive pressures develop at the originating end as new entrants offer alternatives, the terminating end of a long-distance call may remain a bottleneck, controlled by the LEC providing access for a particular customer.⁵¹³ We also recognized, however, that excessive terminating access charges could furnish an incentive for IXC's to enter the access market in order to avoid paying excessive terminating access charges.⁵¹⁴

1. Price Cap Incumbent LECs

a. Background

350. We requested comment on various alternative special methods for regulating the terminating access rates of price cap LECs. For instance, we sought comment on whether to establish a ceiling on the terminating access rates of price cap LECs equal to the forward-looking economic cost of providing the service. We suggested alternative methods for measuring forward-looking economic cost, including reference to prices in reciprocal compensation arrangements for the transport and termination charges of telecommunications under sections 251(b)(5) and 252(d)(2) or a requirement that terminating rates be based on a TSLRIC study or other acceptable forward-looking cost-based model.⁵¹⁵

b. Discussion

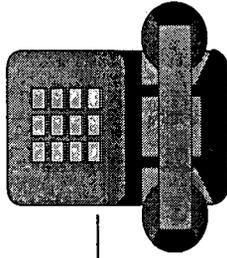
351. We believe that new entrants, by purchasing unbundled network elements or providing facilities-based competition, will eventually exert downward pressure on originating

⁵¹² NPRM at ¶ 271.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at ¶ 272.

⁵¹⁵ NPRM at ¶ 274.

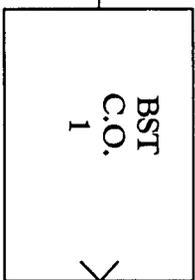


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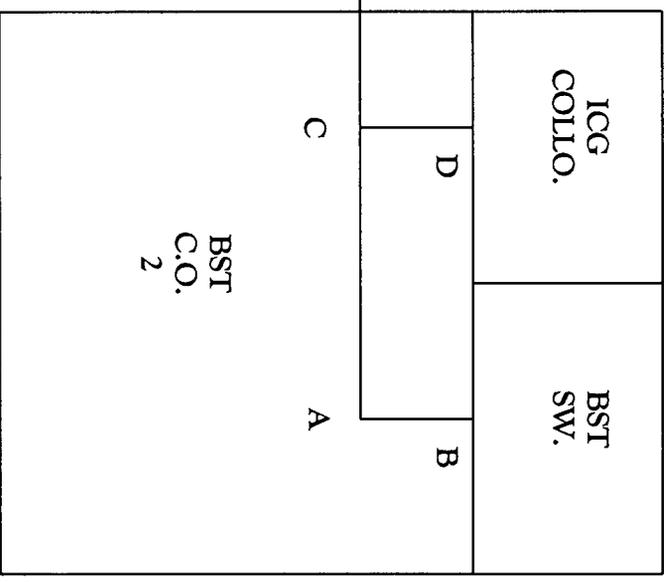


Exhibit No.

§ 51.705 Incumbent LECs' rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511;

(2) Default proxies, as provided in § 51.707; or

(3) A bill-and-keep arrangement, as provided in § 51.713.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to § 51.711.

§ 51.707 Default proxies for incumbent LECs' transport and termination rates.

(a) A state commission may determine that the cost information available to it with respect to transport and termination of local telecommunications traffic does not support the adoption of a rate or rates for an incumbent LEC that are consistent with the requirements of §§ 51.505 and 51.511. In that event, the state commission may establish rates for transport and termination of local telecommunications traffic, or for specific components included therein, that are consistent with the proxies specified in this section, provided that:

(1) Any rate established through use of such proxies is superseded once that state commission establishes rates for transport and termination pursuant to §§ 51.705(a)(1) or 51.705(a)(3); and

(2) The state commission sets forth in writing a reasonable basis for its selection of a particular proxy for transport and termination of local telecommunications traffic, or for specific components included within transport and termination.

(b) If a state commission establishes rates for transport and termination of local telecommunications traffic on the basis of default proxies, such rates must meet the following requirements:

(1) *Termination.* The incumbent LEC's rates for the termination of local tele-

communications traffic shall be no greater than 0.4 cents (\$0.004) per minute, and no less than 0.2 cents (\$0.002) per minute, except that, if a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents (\$0.005) per minute for such calls, that rate may be retained pending completion of a forward-looking economic cost study.

(2) *Transport.* The incumbent LEC's rates for the transport of local telecommunications traffic, under this section, shall comply with the proxies described in § 51.513(c) (3), (4), and (5) of this part that apply to the analogous unbundled network elements used in transporting a call to the end office that serves the called party.

[61 FR 45619, Aug. 29, 1996, as amended at 61 FR 52709, Oct. 8, 1996]

§ 51.709 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in §§ 51.507 and 51.509.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

§ 51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

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EXHIBIT
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 3

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§51.505 and 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

(c) Pending further proceedings before the Commission, a state commission shall establish the rates that licensees in the Paging and Radiotelephone Service (defined in part 22, subpart E of this chapter), Narrowband Personal Communications Services (defined in part 24, subpart D of this chapter), and Paging Operations in the Private Land Mobile Radio Services (defined in part 90, subpart P of this chapter) may assess upon other carriers for the transport and termination of local telecommunications traffic based on the forward-looking costs that such licensees incur in providing such services, pursuant to §§51.505 and 51.511. Such licensees' rates shall not be set based on the default proxies described in §51.707.

§51.713 Bill-and-keep arrangements for reciprocal compensation.

(a) For purposes of this subpart, bill-and-keep arrangements are those in

which neither of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network.

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to §51.711(b).

(c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

§51.715 Interim transport and termination pricing.

(a) Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of local telecommunications traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under sections 251 and 252 of the Act.

(1) This requirement shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of local telecommunications traffic by the incumbent LEC.

(2) A telecommunications carrier may take advantage of such an interim arrangement only after it has requested negotiation with the incumbent LEC pursuant to §51.301.

(b) Upon receipt of a request as described in paragraph (a) of this section, an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of local telecommunications traffic at symmetrical rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

Inter-Carrier Compensation)
for ISP-Bound Traffic)

CC Docket No. 99-68

**Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC
Docket No. 99-68**

Adopted: February 25, 1999

Released: February 26, 1999

NPRM Comment Date: April 12, 1999

NPRM Reply Date: April 27, 1999

By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth not participating; and Commissioner Powell concurring and issuing a statement.

I. INTRODUCTION

1. The Commission and the Common Carrier Bureau (Bureau) have received a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP).¹ Generally, competitive LECs (CLECs) contend that this is local traffic

¹ See, e.g., Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Petition for Partial Reconsideration and Clarification of MFS Communications Co., Inc. at 28; Letter from Richard J. Metzger, General Counsel for ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997) (ALTS Letter); Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30, DA 97-1399 (rel. July 2, 1997) (ALTS Letter Notice); Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic, and Thomas J. Tauke, Senior Vice President -- Government Relations for Bell Atlantic, to Hon. William E. Kennard, Chairman, FCC (July 1, 1998). This question sometimes has been posed more narrowly, i.e., whether an incumbent LEC must pay reciprocal



subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996.² Incumbent LECs contend that this is interstate traffic beyond the scope of section 251(b)(5). **After reviewing the record developed in response to these requests, we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate.** This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained below, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, **we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.**

II. BACKGROUND

2. Identifying the jurisdictional nature and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic fits within our existing regulatory framework. We begin, therefore, with a brief description of relevant terminology and technology. We then turn to the specific matter of LEC delivery of ISP-bound communications.

compensation to a competitive LEC (CLEC) that delivers incumbent LEC-originated traffic to ISPs. Because the pertinent provision of the 1996 Act pertains to all LECs, we examine this issue in the broader context. 47 U.S.C. § 251(b)(5).

For purposes of this Declaratory Ruling, we refer to providers of enhanced services and providers of information services as ESPs, a category which includes Internet service providers, which we refer to here as ISPs. As the Commission stated in the *Access Charge Reform Order*, the term "enhanced services," defined in the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information," 47 C.F.R. § 64.702(a), is quite similar to "information services," defined in the Act as offering "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16131-32 n.498 (1997) (*Access Charge Reform Order*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). See also Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, at 11516 (1998) (*Universal Service Report to Congress*) (reiterating Commission's conclusion that the 1996 Act's definitions of telecommunications services and information services "essentially correspond to the pre-existing categories of basic and enhanced services").

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* (1996 Act).

A. The Internet and ISPs.

3. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world.³ The Internet functions by splitting up information into "small chunks or 'packets' that are individually routed . . . to their destination."⁴ With packet-switching, "even two packets from the same message may travel over different physical paths through the network . . . which enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides."⁵

4. An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers.⁶ Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services."⁷ Under this arrangement, the end user generally pays the LEC a flat monthly fee for use of the local exchange network and generally pays the ISP a flat, monthly fee for Internet access.⁸ The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls.

5. Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services,⁹ since 1983 it has exempted ESPs from the payment

³ 47 U.S.C. § 230; see also *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2334 (1997).

⁴ *Universal Service Report to Congress*, 13 FCC Rcd at 11531, 11532.

⁵ *Id.*

⁶ *Id.* at 11532.

⁷ *Id.* at 11531.

⁸ The Commission has acknowledged the significance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues. See, e.g., Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9142-43, 9159, 9160 (1997) (*Universal Service Order*); *Universal Service Report to Congress*, 13 FCC Rcd at 11541-42.

⁹ See, e.g., MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983) (*MTS/WATS Market Structure Order*) ("[a]mong the variety of users of access service are . . . enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*) (referring to "certain classes of exchange access users, including enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 2 FCC Rcd 4305, 4306 (1987) (ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide

of certain interstate access charges.¹⁰ Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs.¹¹ Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.¹² In addition, incumbent LEC expenses and revenue associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.¹³ ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users.¹⁴ In the *Access Charge Reform Order*, the Commission decided to maintain the existing pricing structure pursuant to which ESPs are treated as end users for the

interstate services"); *Access Charge Reform Order*, 12 FCC Rcd at 16131-32 (information service providers "may use incumbent LEC facilities to originate and terminate interstate calls").

¹⁰ The exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

¹¹ Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53 (1988) (*ESP Exemption Order*).

¹² *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. The subscriber line charge (SLC) is an access charge imposed on end users to recover at least a portion of the cost of the interstate portion of LEC facilities used to link each end user to the public switched telephone network (PSTN).

¹³ Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-88 (1989).

¹⁴ See 47 C.F.R. § 69.5(a) ("End user charges shall be computed and assessed upon public end users, and upon providers of public telephones. . ."); see also 47 C.F.R. § 69.5(c) ("Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage."). See also 47 C.F.R. § 69.2(m) (End user means "any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.").

purpose of applying access charges.¹⁵ Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.

6. The Internet provides citizens of the United States with the ability to communicate across state and national borders in ways undreamed of only a few years ago. The Internet also is developing into a powerful instrumentality of interstate commerce. In 1997, we decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."¹⁶ This Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the dynamic market for Internet-related services. We emphasize the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet -- which has flourished to date under our "hands off" regulatory approach -- or the development of competition. We are mindful of the need to address the jurisdictional question at issue here, and the effect the jurisdictional determination may have on inter-carrier compensation for ISP-bound traffic, in a manner that promotes efficient entry by providers of both local telephone and Internet access services, and that, by the same token, does not encourage inefficient entry.

B. Incumbent LEC and CLEC Delivery of ISP-Bound Traffic.

7. Section 251(b)(5) of the Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."¹⁷ In the *Local Competition Order*, this Commission construed this provision to apply only to the transport and termination of "local telecommunications traffic."¹⁸ In order to determine what compensation is

¹⁵ *Access Charge Reform Order*, 12 FCC Rcd at 16133-34. On August 19, 1998, the U.S. Court of Appeals for the Eighth Circuit affirmed the Commission's *Access Charge Reform Order*. Specifically, the court found that the Commission's decision to exempt information services providers from the application of interstate access charges (other than SLCs) was consistent with past precedent, did not unreasonably discriminate in favor of ISPs, did not constitute an unlawful abdication of the Commission's regulatory authority in favor of the states, and did not deprive incumbents of the ability to recover their pertinent costs. *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

¹⁶ *Access Charge Reform Order*, 12 FCC Rcd at 16134. See also 47 U.S.C. § 230(b)(2) ("It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

¹⁷ 47 U.S.C. § 251(b)(5).

¹⁸ See 47 C.F.R. § 51.701; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996); *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC

due when two carriers collaborate to deliver a call to an ISP, we must determine as a threshold matter whether this is interstate or intrastate traffic. In general, an originating LEC end user's call to an ISP served by another LEC is carried (1) by the originating LEC from the end user to the point of interconnection (POI) with the LEC serving the ISP; (2) by the LEC serving the ISP from the LEC-LEC POI to the ISP's local server; and (3) from the ISP's local server to a computer that the originating LEC end user desires to reach via the Internet. If these calls terminate at the ISP's local server (where another (packet-switched) "call" begins), as many CLECs contend, then they are intrastate calls, and LECs serving ISPs are entitled to reciprocal compensation for the "transport and termination" of this traffic. If, however, these calls do not terminate locally, incumbent LECs argue, then LECs serving ISPs are not entitled to reciprocal compensation under section 251(b)(5).

8. CLECs argue that, because section 251(b)(5) of the Act refers to the duty to establish reciprocal compensation arrangements for the "transport and termination of telecommunications,"¹⁹ a transmission "terminates" for reciprocal compensation purposes when it ceases to be "telecommunications."²⁰ "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²¹ CLECs contend that, under this definition, Internet service is not "telecommunications" and that the "telecommunications" component of Internet traffic terminates at the ISP's local server. In addition, CLECs and ISPs argue that, given that ESPs are exempt from paying certain interstate access charges²² and that, as a result, the PSTN links serving ESPs are treated as intrastate under

Rcd 12460 (1997); *further recon. pending*. State commissions that considered this issue reached the same conclusion. *See, e.g.*, Petition of the Southern New England Tel. Co. for a Declaratory Ruling Concerning Internet Servs. Provider Traffic, Docket No. 97-05-22, Decision, at 9 (Conn. Comm'n September 17, 1997); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-04, Decision 98-10-057, at 7 (Cal. Comm'n October 28, 1998); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, MO-98-CA-43, slip op. at 7 (W.D. Tex. June 16, 1998). Section 251 of the Act makes clear that interstate traffic remains subject to the Commission's jurisdiction under section 201. *See* 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."). *See also CompTel*, 117 F.3d at 1075 (Commission acted within its jurisdiction in allowing incumbent LECs to collect, on an interim basis, access charges for interstate calls traversing the incumbent LECs' local switches for which the interconnecting carriers pay unbundled local switching element charges); 47 U.S.C. §152(a) (Commission has jurisdiction over "all interstate and foreign communications by wire").

¹⁹ 47 U.S.C. § 251(b)(5) (emphasis added).

²⁰ *See, e.g.*, RCN Telecom Services (RCN) Comments at 6; Teleport Communications Group Inc. (TCG) Comments at 4-5; WorldCom, Inc. Comments at 8-9. Citations to parties' comments in this Declaratory Ruling and Notice of Proposed Rulemaking refer to comments filed in response to the *ALTS Letter Notice*.

²¹ 47 U.S.C. § 153(43).

²² We discuss the ESP exemption, *supra*.

the separations regime, the services that CLECs provide for ISPs must be deemed local.²³ Incumbent LECs contend, however, that the "telecommunications" terminate not at the ISP's local server, but at the Internet site accessed by the end user, in which case these are interstate calls for which, they argue, no reciprocal compensation is due.²⁴

III. DISCUSSION

9. The Commission has no rule governing inter-carrier compensation for ISP-bound traffic. Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (*e.g.*, by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. As explained above, under the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs. As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute.

A. Jurisdictional Nature of Incumbent LEC and CLEC Delivery of ISP-Bound Traffic.

10. As many incumbent LECs properly note,²⁵ the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, for example, the

²³ See, *e.g.*, American Communications Services, Inc. (ACSI) Comments at 5; Adelphia Communications Corporation (Adelphia), et al., Comments at 12-13; ALTS Letter at 6-7; ALTS Reply at 2, 13; Cox Communications, Inc. (Cox) Comments at 5; America Online, Inc. (AOL) Comments at 7-8; AT&T Corp. Comments at 4.

²⁴ See, *e.g.*, Ameritech Operating Cos. (Ameritech) Comments at 13; BellSouth Corporation (BellSouth) Reply at 4-6; Southwestern Bell Tel. Co., Pacific Bell, Nevada Bell (SBC) Reply at 5; United States Telephone Association (USTA) Comments at 5-6.

²⁵ See, *e.g.*, Ameritech Comments at 13; BellSouth Reply at 4-6; SBC Reply at 5; USTA Comments at 5-6.

Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus.²⁶ The Commission determined that the entire transmission constituted one interstate call, because "there is a continuous path of communications across state lines between the caller and the voice mail service."²⁷ The Commission's jurisdictional determination did not turn on the common carrier status of either the provider or the services at issue;²⁸ *BellSouth MemoryCall* is not, therefore, distinguishable on the grounds that ISPs are not common carriers.

11. Similarly, in *Teleconnect*, the Bureau examined whether a call using Teleconnect's "All-Call America" (ACA) service, a nationwide 800 travel service that uses AT&T's Megacom 800 service, is a single, end-to-end call.²⁹ Generally, an ACA call is initiated by an end user from a common line open end; the call is routed through a LEC to an AT&T Megacom line, and is then transferred from AT&T to Teleconnect by another LEC.³⁰ At that point, Teleconnect routes the call through the LEC to the end user being called.³¹ The Bureau rejected the argument that the (ACA) 800 call used to connect to an interexchange carrier's (IXC) switch was a separate and distinct call from the call that was placed from that switch.³² The Commission affirmed, noting that "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communications under the Communications Act from its inception to its completion."³³ The Commission concluded that "an

²⁶ Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*).

²⁷ *Id.* at 1620.

²⁸ *Id.* at 1621-22. Indeed, the Commission expressly noted that, although BellSouth's "voice mail service is an enhanced service, that fact does not limit our authority to preempt." *Id.* at 1622 n.44.

²⁹ *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997).

³⁰ *Id.* at 1627.

³¹ *Id.* at 1627-28.

³² *Id.* at 1626.

³³ *Id.* at 1629 (citing *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (concluding that a physically intrastate in-WATS line, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation)). See also *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944) (the Act contemplates the regulation of interstate wire communication from its inception to its completion), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *New York Telephone Co.*, 76 FCC 2d 349, 352-53 (1980) (physically intrastate foreign exchange facilities used to carry interconnected interstate traffic are subject to federal jurisdiction).

interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."³⁴ In addition, in *Southwestern Bell Telephone Company*, the Commission rejected the argument that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the interexchange carrier's switch, and another from the switch to the called party" and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication."³⁵

12. Consistent with these precedents,³⁶ we conclude, as explained further below, that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend,³⁷ but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.³⁸ The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction. As the Commission stated in *BellSouth MemoryCall*, "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."³⁹ Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state.⁴⁰ Thus, we reject MCI WorldCom's assertion that the LEC facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate.⁴¹

³⁴ *Teleconnect*, 10 FCC Rcd at 1629.

³⁵ In the Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) (*Southwestern Bell Tel. Co.*).

³⁶ Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs," *Access Charge Reform Order*, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis.

³⁷ See, e.g., ACSI Comments at 5; Adelpia, et al., Comments at 12-13; ALTS Letter at 6-7; Cox Comments at 5.

³⁸ This conclusion is fully consistent with *BellSouth MemoryCall*. Although MCI WorldCom relies on *BellSouth MemoryCall* to support its argument that the ISP is the relevant endpoint for purposes of the jurisdictional analysis (see Letter from Richard S. Whitt, Director -- Federal Affairs/Counsel, MCI WorldCom, Inc., to Magalie R. Salas, Secretary, FCC (October 2, 1998)), there, as here, the Commission analyzed the communication from its inception to the "transmission's ultimate destination." *BellSouth Memory Call*, 7 FCC Rcd at 1621.

³⁹ *BellSouth MemoryCall*, 7 FCC Rcd at 1621.

⁴⁰ See *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

⁴¹ See Letter from Richard S. Whitt, Director -- Federal Affairs/Counsel, MCI WorldCom, Inc., to Magalie R. Salas, Secretary, FCC (October 19, 1998) (*MCI WorldCom Ex Parte*). For this reason, we also reject CLEC arguments that provision of such services by a Bell Operating Company (BOC) violates section 271 of the Act

13. We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP.⁴² As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.⁴³ The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service.⁴⁴ Although the Commission concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund,⁴⁵ it has never found that "telecommunications" end where "enhanced" service begins. To the contrary, in the context of open network architecture (ONA) elements, for example, the Commission stated that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."⁴⁶ The 1996

unless the BOC has received authorization to provide in-region InterLATA service. *See, e.g., MCI WorldCom Ex Parte* at 4. Section 271 does not bar BOC provision of interstate access services, such as interLATA information access. *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, 11 FCC Rcd 21905, 21962-63 (*Non-Accounting Safeguards Order*) ("When a BOC is neither providing nor reselling the interLATA transmission component of an information service that may be accessed across LATA boundaries, the statute does not require that service to be provided through a section 272 separate affiliate.").

⁴² *See, e.g.,* RCN Comments at 6; TCG Comments at 4-5; WorldCom Comments at 8-9.

⁴³ *See United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

⁴⁴ *Universal Service Order*, 12 FCC Rcd at 9179-81. We disagree with MCI WorldCom's claim that the Commission determined in the *Universal Service Order* that there are two distinct transmissions when an end user contacts the Internet. *MCI WorldCom Ex Parte* at 4. In that order, the Commission discussed various "connections" involved with Internet access but in no way implied that any "transmission" or "traffic" terminated or originated at any intermediate point. *See Universal Service Order*, 12 FCC Rcd at 9180. As discussed, *supra*, MCI WorldCom's similar assertions regarding the *Non-Accounting Safeguards Order* are equally unpersuasive. *MCI WorldCom Ex Parte* at 4.

⁴⁵ *Id.* at 9180. We confirmed this view in the *Universal Service Report to Congress. Universal Service Report to Congress* at 13 FCC Rcd 11522-23.

⁴⁶ *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 141 (1988) ("when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation"), *aff'd sub nom. People of State of Cal. v. FCC*, 3 F.3d 1505 (9th Cir. 1993). *See, e.g.,* Amendment of Section 64.702 of the Commission's Rules and Regulations, 2 FCC Rcd 3072, 3080 (1987) ("carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitors' enhanced services"); *vacated on other grounds sub nom. People of State of Cal. v. FCC*, 905 F.2d 1217 (9th Cir. 1990). *See also BellSouth MemoryCall*, 7 FCC Rcd at 1621 (rejecting "two call" argument as applied to interstate call to voice mail apparatus, even though voice mail is an enhanced service).

Act is consistent with this approach. For example, as amended by the 1996 Act, Section 3(20) of the Communications Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."⁴⁷ This definition recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications. Although it concluded in the *Universal Service Report to Congress* that ISPs do not provide "telecommunications" as defined in the 1996 Act,⁴⁸ the Commission reiterated the traditional analysis that ESPs enhance the underlying telecommunications service.⁴⁹ **Thus, we analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.**

14. Some CLECs note that the language of section 252(d)(2) provides for the recovery of the costs of transporting and terminating a "call."⁵⁰ Although the 1996 Act does not define the term "call," these CLECs argue that it is used in the 1996 Act in a manner that implies a circuit-switched connection between two telephone numbers.⁵¹ For example, Adelphia contends that a "call" takes place when two stations on the PSTN are connected to each other.⁵² A call "terminates," according to Adelphia, when one station on the PSTN dials another station, and the second station answers.⁵³ Under this view, the "call" associated with Internet traffic ends at the ISP's local premises.⁵⁴

15. We find that this argument is inconsistent with Commission precedent, discussed above, holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts. The examples cited by CLECs⁵⁵ to support the

⁴⁷ 47 U.S.C. § 153(20) (emphasis added); see also 47 C.F.R. § 64.702(a) (enhanced services are provided "over common carrier transmission facilities used in interstate communications").

⁴⁸ *Universal Service Report to Congress*, 13 FCC Rcd at 11536-40. See also *Universal Service Order*, 12 FCC Rcd at 9180 n.2023.

⁴⁹ See *Universal Service Report to Congress*, 13 FCC Rcd at 11540. See also *Universal Service Order* 12 FCC Rcd at 9180 n.2023 (referencing *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, 3080 (1987)).

⁵⁰ 47 U.S.C. § 252(d)(2). See, e.g., Adelphia, et al., Comments at 15.

⁵¹ See, e.g., Adelphia, et al., Comments at 15-20; Adelphia, et al., Reply at 5, 9-10, TCG Comments at 3-4; WorldCom Comments at 6-7.

⁵² See, e.g., Adelphia, et al., Comments at 15-16.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 15-16, 19-20; Adelphia, et al., Reply at 18 n.32.

argument that calls end at the called number are not dispositive. The statutory sections upon which they rely were written to apply to specific situations, all of which, as far as we can tell, involve traditional telephony connections between two called numbers, as opposed to the novel circumstance of Internet traffic.⁵⁶

16. Nor are we persuaded by CLEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence.⁵⁷ The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.⁵⁸ In the *MTS/WATS Market Structure Order*, for instance, the Commission concluded that ESPs are "among a variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area."⁵⁹ The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary.⁶⁰ We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic.⁶¹

⁵⁶ See, e.g., 47 U.S.C. §§ 222(d)(3), 223(a)(1), 271(c)(2)(B)(x), and 271(j).

⁵⁷ See, e.g., ACSI Comments at 5; Adelphia, et al., Comments at 12-13; ALTS Letter at 6-7; ALTS Reply at 2, 13; Cox Comments at 5; AOL Comments at 7-8; AT&T Comments at 4.

⁵⁸ See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 715; Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987).

⁵⁹ *MTS/WATS Market Structure Order*, 97 FCC 2d at 860; see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305.

⁶⁰ See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 860. See also Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354 at 21478 ("although ESPs may use incumbent LEC facilities to originate and terminate interstate calls, ESPs should not be required to pay interstate access charges") (emphasis added).

⁶¹ Indeed, the Eighth Circuit found that "the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the SLC . . . , but not to pay the per-minute interstate access charge." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d at 543 (emphasis added).

17. CLECs also argue that the traffic they deliver to ISPs must be deemed either "telephone exchange service"⁶² or "exchange access."⁶³ They contend that ISP traffic cannot be "exchange access," because neither LECs nor CLECs assess toll charges for the service. CLEC delivery of ISP traffic is, therefore, according to CLECs, "telephone exchange service," a form of local telecommunications for which reciprocal compensation is due.⁶⁴ As discussed above, however, the Commission consistently has characterized ESPs as "users of access service" but has treated them as end users for pricing purposes.⁶⁵ Thus, we are unpersuaded by this argument.

18. Having concluded that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, we now must determine whether that transmission constitutes interstate telecommunications. Section 2(a) of the Act grants the Commission jurisdiction over "all interstate and foreign communication by wire."⁶⁶ Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia."⁶⁷ In a conventional circuit-switched network, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate. **The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet.**⁶⁸ **An Internet communication does not necessarily have a point of "termination" in the traditional sense.** An Internet user typically communicates

⁶² "Telephone exchange service" means "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47).

⁶³ "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16). "Telephone toll services" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48).

⁶⁴ See, e.g., *Adelphia, et al.*, Reply at 5-9.

⁶⁵ *MTS/WATS Market Structure Order*, 97 FCC 2d at 860; see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987). See also 47 C.F.R. § 69.2(b) (defining "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunications").

⁶⁶ 47 U.S.C. § 152(a).

⁶⁷ *Universal Service Report to Congress*, 13 FCC Rcd at 11555.

⁶⁸ See, e.g., Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29, at 45 (Mar. 1997) (*Digital Tornado*).

with more than one destination point during a single Internet call, or "session," and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country.⁶⁹ Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple servers throughout the Internet, based on "caching" or website "mirroring" techniques.⁷⁰ After reviewing the record, we conclude that, although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites.⁷¹

19. Although ISP-bound traffic is jurisdictionally mixed, incumbent LECs argue that it is not technically possible to separate the intrastate and interstate ISP-bound traffic.⁷² In the current absence of a federal rule governing inter-carrier compensation, however, we do not find it necessary to reach the question of whether such traffic is separable into intrastate and interstate traffic.⁷³

20. Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs.⁷⁴ Nor, as we discuss below, is it dispositive of interconnection disputes currently before state commissions.

⁶⁹ See, e.g., *Digital Tornado* at 45. See also *Adelphia, et al., Reply* at 11 n.21.

⁷⁰ See, e.g., *MCI WorldCom Ex Parte* at 7.

⁷¹ See, e.g., *Adelphia, et al., Comments* at 22; Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic, and Thomas J. Tauke, Senior Vice President -- Government Relations for Bell Atlantic, to Hon. William E. Kennard, Chairman, FCC (July 1, 1998) at Att. 2; *Compuserve Comments* at 4; Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie R. Salas, Secretary, FCC (May 13, 1998) Att. at 7; *WorldCom Reply* at 8-9.

⁷² Even if it is technically impossible to separate the intrastate and interstate ISP traffic, it may be possible for LECs to determine whether dial-up traffic is in fact destined for an ISP.

⁷³ We note that in Section IV, *infra*, we seek comment on the separability of such traffic and whether the Commission should exercise exclusive jurisdiction over inter-carrier compensation for all ISP-bound traffic.

⁷⁴ ESPs also have certain flat-rated interstate offerings available to them. See, e.g., *GTE Telephone Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC No. 98-292, Memorandum Opinion and Order* (rel. October 30, 1998), *recon. pending*.

B. Inter-Carrier Compensation for Delivery of ISP-Bound Traffic.

21. We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism. We seek comment on such a rule in Section IV, below.

22. Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. **Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.**

23. Although we determine, above, that ISP-bound traffic is largely interstate, parties nonetheless may have agreed to treat the traffic as subject to reciprocal compensation. The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs.⁷⁵ Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. **Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes.**⁷⁶

24. Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. **When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate**

⁷⁵ *MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

⁷⁶ Not all incumbent LECs characterize Internet traffic as intrastate traffic for separations purposes. In January, 1998, SBC indicated that it planned to allocate 100 percent of the costs associated with Internet traffic, which it previously had classified as local, to the interstate jurisdiction. See Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Ken Moran, Chief, Accounting and Audits Division, FCC (Jan. 20, 1998).

or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions. Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.⁷⁷ Finally, we note that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction.⁷⁸

25. Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions⁷⁹ to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. **As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant**

⁷⁷ This analysis is not inconsistent with our conclusion in the *Local Competition Order* that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within state-defined local calling areas. *Local Competition Order*, 11 FCC Rcd. at 16013. In so construing the statutory obligation, we did not preclude parties from agreeing to include interstate traffic (or non-local intrastate traffic) within the scope of their interconnection agreements, so long as no Commission rules were otherwise violated. See 47 U.S.C. § 252(a)(1) (parties may negotiate and enter into a binding agreement without regard to the standards set forth in section 251(b) and (c)).

⁷⁸ See, e.g., Complaint of WorldCom Technologies, Inc. against New England Tel. and Tel. Co. for alleged breach of interconnection terms entered into under Section 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116, at 13 (Mass. Comm'n October 26, 1998) (requesting information from parties regarding whether certain CLECs have been or are established solely (or predominantly) for the purpose of delivering traffic to ISPs, particularly ISPs affiliated with the CLECs in question, and stating that these facts might affect such CLECs' regulatory status); Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie R. Salas, Secretary, FCC (May 13, 1998) at Tab 5 (carrier's webpage advertisement invites parties to offer "free internet access while getting paid for it"). We believe the state commissions are capable of assessing whether and to what extent these and other anomalous practices are inconsistent with the statutory scheme (e.g., definition of a carrier) and thereby outside the scope of any determination regarding inter-carrier compensation.

⁷⁹ See 47 U.S.C. §§ 251, 252.

to section 252 "extends to both interstate and intrastate matters."⁸⁰ Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.⁸¹ However, any such arbitration must be consistent with governing federal law.⁸² While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

26. Some CLECs construe our rules treating ISPs as end users for purposes of interstate access charges as requiring the payment of reciprocal compensation for this traffic.⁸³ Incumbent LECs contend, however, that our rules preclude the imposition of reciprocal compensation obligations to interstate traffic and that, pursuant to the ESP exemption, LECs carrying ISP-bound traffic are compensated by their end user customers -- the originating end user or the ISP.⁸⁴ Either of these options might be a reasonable extension of our rules, but the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP. As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic.⁸⁵ In the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic,⁸⁶ neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in

⁸⁰ *Local Competition Order*, 11 FCC Rcd at 15544; see also *id.* at 15547 (sections 251 and 252 "address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements").

⁸¹ *Id.*

⁸² Cf. 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.").

⁸³ See note 26, *supra*, and accompanying text.

⁸⁴ See, e.g., Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to Magalie Salas, Secretary, FCC (November 20, 1998). Ameritech argues, *inter alia*, that the Commission held in the *Local Competition Order* that reciprocal compensation does not apply to the transport and termination of interstate traffic. *Id.*, Att. A, at 6. It further argues that Commission rules do in fact address inter-carrier compensation for ISP traffic. In the usual case, two LECs jointly providing interstate access service share access revenues; because the Commission exempts ISPs from the payment of access charges, however, LECs carrying ISP traffic are limited to revenues they collect from their end user customers. *Id.*, Att. A, at 7.

⁸⁵ We seek comment on an appropriate compensation mechanism in Section IV, below.

⁸⁶ See 47 C.F.R. 51.701(a); *Local Competition Order*, 11 FCC Rcd at 16013.

certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.⁸⁷ A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic.⁸⁸ By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

27. State commissions considering what effect, if any, this Declaratory Ruling has on their decisions as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic might conclude, depending on the bases of those decisions, that it is not necessary to re-visit those determinations. We recognize that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

IV. Notice of Proposed Rulemaking (CC Docket No. 99-68)

A. Discussion.

28. We do not have an adequate record upon which to adopt a rule regarding inter-carrier compensation for ISP-bound traffic. We do believe, however, that adopting such a rule to govern prospective compensation would serve the public interest. As a general matter, we tentatively conclude that our rule should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts. We seek comment on two alternative proposals for implementing such a regime. Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic. As discussed above, the Commission's holding that parties' agreements, as interpreted by state

⁸⁷ As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic. As discussed, *supra*, in the absence a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.

⁸⁸ As noted, in other contexts we have directed the states to treat such traffic as local. See *ESP Exemption Order*, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53.

commissions, should be binding also applies to those state commissions that have not yet addressed the issue.

29. For the traffic at issue here, we tentatively conclude that a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation. In addition, setting a rate by regulation appears unwise because the actual amounts, need for, and direction of inter-carrier compensation might reasonably vary depending on the underlying commercial relationships with the end user, and who ultimately pays for transmission between its location and the ISP.⁸⁹ We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network. We believe that efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures. In particular, pure minute-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic. For example, flat-rated pricing based on capacity may be more cost-based. Parties also might reasonably agree to rates that include a separate call set-up charge, coupled with very low per-minute rates. These economic characteristics of this traffic are likely to make voluntary agreements among the parties easier to reach. For these reasons, we propose that inter-carrier compensation rates for ISP-bound traffic be based on commercial negotiations undertaken as part of the broader interconnection negotiations between incumbent LECs and CLECs. We seek comment below on two alternative proposals to govern the negotiations with respect to ISP-bound traffic.

30. We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts. As with other issues on which parties petition state commissions for arbitration under section 252 of the Act, if a state commission fails to act, the Commission will assume the responsibility of the state commission within 90 days of being notified of such failure.⁹⁰ This proposal could help facilitate the policy goals set forth above by forcing the parties to hold a single set of negotiations regarding rates, terms, and conditions for interconnected traffic and to submit all disputes regarding interconnected traffic to a single arbitrator. We seek comment on this tentative conclusion.

⁸⁹ When an end user effectively purchases a telecommunications-based service from more than one service provider, it can pay for the costs of the underlying telecommunications either directly to the telecommunications service provider, or indirectly through the other service provider, which in turn pays the telecommunications provider. Both sets of arrangements exist today.

⁹⁰ 47 U.S.C. § 252(e)(5).

31. We also seek comment on an alternative proposal that we adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties would engage in negotiations concerning rates, terms, and conditions applicable to delivery of interstate ISP-bound traffic. These negotiations would commence on the effective date of the adopted rule but could proceed in tandem with broader interconnection negotiations between the parties. We realize, however, that the success of any negotiation over rates is likely to depend on the availability of the swift and certain resolution of disputes, and the structure of the resolution process. For example, the Commission, through delegation to the Common Carrier Bureau, might resolve such disputes, at the request of either party, through an arbitration-like process, following a discrete period of voluntary negotiation. We seek comment on how such an approach would operate procedurally and what costing standards the Commission might use in arbitrating disputes. We also seek comment on how this proposal compares with a broad interconnection negotiation in which most disputes are resolved by a state arbitrator but disputes regarding ISP-bound traffic are resolved through a federal arbitration-like process. We also seek comment on whether it is possible, as a technical matter, to segregate intrastate and interstate ISP-bound traffic and whether any federal rules we adopt should apply to all intrastate and interstate ISP-bound traffic.

32. We also seek comment on whether the Commission has the authority to establish an arbitration process that is final and binding and not subject to judicial review. For instance, we note that parties might agree to binding arbitration pursuant to the Administrative Dispute Resolution Act.⁹¹ We seek comment on whether and how such a system should be implemented. In particular, we seek comment on the desirability of arbitration before an arbitrator selected by the parties, as provided by the Administrative Dispute Resolution Act, as opposed to a federal or state decision-maker.⁹²

33. We also invite parties to submit alternative proposals for inter-carrier compensation for interstate ISP-bound traffic that will advance our policy goals in this area. For example, Ameritech has proposed basing inter-carrier compensation for ISP-bound traffic on sharing the incumbent LEC's revenue associated with the interconnected ISP-bound traffic.⁹³ We also request parties to comment on how any alternatives they propose will advance the Commission's goals of ensuring the broadest possible entry of efficient new competitors, eliminating incentives for inefficient entry and irrational pricing schemes, and providing to consumers as rapidly as possible the benefits of competition and emerging technologies.

⁹¹ Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2738, *codified at* 5 U.S.C. § 571 *et seq.*

⁹² *See* 5 U.S.C. § 577.

⁹³ *See* Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, Inc., to Magalie R. Salas, Secretary, FCC (July 17, 1998).

34. We are aware that disputes may arise regarding various terms and conditions for inter-carrier compensation for ISP-bound traffic. Although many such disputes could be resolved through a negotiation and arbitration process, we seek comment on whether there are any issues under our two proposals above that we can and should address in the first instance through rules rather than through arbitration. We request parties to comment on the need for rules pertaining to such matters and, to the extent that parties believe that rules are appropriate, the substance and degree of specificity of such rules. We emphasize, however, that we do not seek comment on whether interstate access charges should be imposed on ESPs as part of this proceeding. We recently reaffirmed that exemption in the *Access Charge Reform Order*, and we do not reconsider it here.⁹⁴

35. Pursuant to section 252(i) of the Act,⁹⁵ interconnection agreements often have clauses (often referred to as "most-favored nation" or "MFN" provisions) that allow parties to select, to varying degrees of specificity, provisions from other parties' interconnection agreements with that particular LEC. We understand that an arbitrator recently permitted a CLEC to exercise MFN rights to opt into an interconnection agreement that an incumbent LEC previously had negotiated with another CLEC.⁹⁶ That interconnection agreement, executed in July 1996, has a three-year term. The arbitrator concluded that the new CLEC was entitled to opt into the agreement for a new three-year term, thus raising the possibility that the incumbent LEC might be subject to the obligations set forth in that agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLECs opt into the agreement.⁹⁷ We seek comment, therefore, on whether and how section 252(i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements.

36. As discussed above, not all ISP-bound traffic is interstate. We seek comment on whether we should adopt rules for the interstate traffic that would coexist with state rules governing the intrastate traffic, or whether it is too difficult or inefficient to separate intrastate ISP-bound traffic from interstate ISP-bound traffic. We further seek comment on the technical and practical implications of requiring the separation of intrastate and interstate ISP-bound traffic. In addition, we seek comment on the implications of various proposals regarding inter-carrier compensation for ISP-bound traffic on the separations regime, such as the appropriate treatment of incumbent LEC revenues and payments associated with the delivery of such traffic. This Commission is mindful of concerns that our jurisdictional analysis may result in allocation to

⁹⁴ *Access Charge Reform Order*, 12 FCC Rcd at 16133.

⁹⁵ 47 U.S.C. § 252(i).

⁹⁶ See Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie R. Salas, Secretary, FCC (October 28, 1998), at 2, Att. 3 at 6-8.

⁹⁷ *Id.*

different jurisdictions of the costs and revenues associated with ISP-bound traffic,⁹⁸ and we wish to make clear that we have no intention of permitting such a mismatch to occur. With respect to current arrangements, we note that this order does not alter the long-standing determination that ESPs (including ISPs) can procure their connections to LEC end offices under intrastate end-user tariffs, and thus for those LECs subject to jurisdictional separations both the costs and the revenues associated with such connections will continue to be accounted for as intrastate.

B. Procedural Matters.

1. Ex Parte Presentations.

37. This Notice of Proposed Rulemaking is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex Parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.⁹⁹

2. Initial Regulatory Flexibility Analysis.

38. As required by the Regulatory Flexibility Act (RFA),¹⁰⁰ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking (Notice)*. Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the *Notice*, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), in accordance with the RFA, 5 U.S.C. § 603(a).

39. *Need for and Objectives of the Proposed Rules.* We tentatively conclude that we should adopt a rule regarding inter-carrier compensation for ISP-bound traffic that strongly reflects our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts. We seek comment on two alternative proposals for implementing such a regime. **Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic. In light of comments received in response to the Notice, we might issue new rules or alter existing rules.**

⁹⁸ See Letter from James Bradford Ramsay, Assistant General Counsel, National Association of Regulatory Utility Commissioners, to Magalie R. Salas, Secretary, FCC (December 14, 1998).

⁹⁹ See generally 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

¹⁰⁰ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

40. *Legal Basis.* The legal basis for any action that may be taken pursuant to the *Notice* is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 251, 252, and 303(r).

41. *Description and Estimate of the Number of Small Entities That May Be Affected by the Notice of Proposed Rulemaking.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.¹⁰¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.¹⁰² The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.¹⁰³ Consistent with prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."¹⁰⁴ Although such a company may have 1,500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

42. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.¹⁰⁵ This number includes a variety of different categories of carriers, including local exchange carriers (both incumbent and competitive), interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned or operated."¹⁰⁶ For

¹⁰¹ See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

¹⁰² 15 U.S.C. § 632.

¹⁰³ See 13 C.F.R. § 121.201.

¹⁰⁴ See, e.g., *Local Competition Order*, 11 FCC Rcd at 16150.

¹⁰⁵ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

¹⁰⁶ 15 U.S.C. § 632(a)(1).

example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are either small entities or small incumbent LECs that may be affected by this *Notice*.

43. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).¹⁰⁷ According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.¹⁰⁸ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, or are dominant, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 small providers of local exchange service are small entities or small incumbent LECs that may be affected by the *Notice*.

44. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of rules that we may adopt, incumbent LECs and CLECs may be required to discern the amount of traffic carried on their networks that is bound for ISPs. In addition, such incumbent LECs and entrants may be required to produce information regarding the costs of carrying ISP-bound traffic on their networks.

45. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As noted above, we propose to adopt rules that may require incumbent LECs and CLECs to discern the amount of traffic carried on their networks that is bound for ISPs.¹⁰⁹ We anticipate that if we adopt such rules, incumbent LECs and CLECs, including small entity incumbent LEC and CLECs, will be able to receive compensation for the delivery of ISP-bound traffic that they might not otherwise receive. The *Notice* also requests comment on alternative proposals.

46. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

¹⁰⁷ FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying into the TRS Fund by Type of Carrier)* (Nov. 1997).

¹⁰⁸ *Id.*

¹⁰⁹ See ¶¶ 28-36, *supra*.

3. Comment Filing Procedures.

47. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 12, 1999, and reply comments on or before April 27, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹¹⁰

48. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail message to ecfs@fcc.gov and include "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

49. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth St., S.W., Room TW-A325, Washington, DC 20554.

50. Parties that choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Harris, Federal Communications Commission, Common Carrier Bureau, Competitive Pricing Division, 445 Twelfth St., S.W., Fifth Floor, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the docket number in this case, CC Docket No. 99-68); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036.

¹¹⁰ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

V. Ordering Clauses

51. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-209, 251, 252, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 251, 252 and 403, that this Notice of Proposed Rulemaking IS HEREBY ADOPTED and comments ARE REQUESTED as described above.

52. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**Separate Statement
of
Commissioner Susan Ness**

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket 96-98); and Inter-carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68)

This proceeding is one of unusual importance and unusual complexity.

The debate over reciprocal compensation for ISP-bound traffic is *important* for three main reasons. First, the issues we review here involve access to the Internet, a unique, extraordinary, and ever-evolving national and international network of networks that is rapidly transforming communication, commerce, and communities. Second, reciprocal compensation may substantially affect the nature and the extent of local telephone competition, which was a principal objective of the Telecommunications Act of 1996. Third, any decision in this area may affect relationships between state and federal regulatory authorities, who must work in harmony to achieve successful implementation of the Telecommunications Act.

The debate is *complex* because it involves the application of legal precedents from the early 1980s to services and carrier arrangements that were unimaginable only a few short years ago, as well as provisions of the 1996 Act that have already led to considerable controversy and litigation. We must grapple with equities that may be quite different when viewed prospectively than when viewed retrospectively. A further complication is that reciprocal compensation involves certain issues that can better be assessed by state public utility commissions than by the FCC, and yet it also implicates important national interests affecting access to an interstate (and international) service.

At the end of the day, however, I believe the case boils down to elementary and straightforward propositions. Switched network telephone calls to Internet service providers are inherently interstate, which is the decision most consistent with our prior creation of an ESP exemption from interstate access charges -- and with the interstate and international nature of the Internet. But to say this is *not* to overrule, undermine, or prevent state commission decisions that construe interconnection agreements to require reciprocal compensation for ISP-bound traffic. It was, and remains, reasonable for the states (and federal district courts) to so rule, given our prior decisions -- and the practices of the ILECs themselves -- to treat this traffic as local.¹

¹ Since 1983, the Commission has consistently and consciously permitted enhanced service providers, a category that now includes Internet service providers (ISPs) to connect to their customers using local business lines. See, e.g., *MTS and WATS Market Structure*, 97 FCC 2d 682, 715, para. 83 (1983) (subsequent history omitted). Enhanced service providers use "interstate access" but pay "local business exchange service rates." *Id.* (emphasis added); see also *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631, 2635 n.8 (1988) ("enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices") (emphasis added); accord *id.* at 2637 n.53.

This decision was not altered by passage of the Telecommunications Act of 1996. After that law was passed, we expressly reiterated that ISPs "purchase services from incumbent LECs under the same intrastate tariffs available to end users" and determined that, if "intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers

And, although we are declaring that there are national interests that must be respected on a going-forward basis, it may well be that these interests can be protected without changing the long-standing decision to treat this traffic as local. One could readily imagine, for example, that states will not seek to assess per-minute fees on Internet-bound calls, just as the FCC has repeatedly resisted entreaties to do so. One can also reasonably foresee that, even if ISP-bound traffic continues to be handled by the state commissions under the usual 251/252 process, the parties themselves (in voluntarily negotiated agreements) or the state commissions (if called upon to arbitrate agreements between incumbents and new entrants) will in future agreements address the issues associated with ISP-bound traffic in ways that avoid some of the obvious anomalies and competitive distortions that may result from some of the current ILEC-CLEC arrangements.

In short, I believe the decision we have adopted is one that (1) comports with the law, (2) is fair both to incumbent local exchange carriers and to competitive local exchange carriers, (3) does not unravel the core determinations of the more than two dozen state commissions that have addressed this issue, (4) sets the stage for future determinations that will eliminate or at least attenuate any anomalies inherent in current compensation arrangements, and (5) preserves this Commission's ability to safeguard the innovative, competitive, and unregulated character of the Internet. I hope that parties responding to the Notice of Proposed Rulemaking will focus on ways in which all of these objectives may continue to be advanced.

with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators." *Access Charge Reform*, 12 FCC Rcd. 15982, 16132, para. 342 & 16135, para. 346 (1997), *aff'd* *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (emphasis added). The Eighth Circuit explicitly recognized that the manner in which Internet-bound traffic is treated is a product of FCC "discretion." *Southwestern Bell Telephone*, 153 F.3d at 543. It is significant that, in the aforementioned *Access Charge Reform* proceeding, we implicitly affirmed both the FCC's ultimate authority over this traffic and the state commissions' competence to handle it unless and until directed otherwise. It is especially telling that the *Southwestern Bell Telephone* decision, acknowledging the Commission's ultimate authority over such inherently interstate traffic, came from a court that was otherwise quite resistant to FCC encroachment on matters that it deemed to be on the states' side of a "horse-high, hog-tight, and bull-strong fence." *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev'd in pertinent part*, *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL,
CONCURRING**

Re: Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68).

I write separately to explain the bases upon which I concur in this action. Specifically, based on the long inquiry that has led to our action today, I agree with the majority that LEC-to-LEC Internet-bound traffic is properly classified as jurisdictionally interstate. Because of this agreement, and in light of the serious governmental interests implicated, I believe it is appropriate for the Commission to consider whether the current method of determining intercarrier compensation for this traffic at the state level continues to be appropriate. I believe, however, that in a well-meaning effort to preserve existing state decisions regarding reciprocal compensation for this traffic, we have strayed into areas best left to state authorities and may have unwittingly muddled our jurisdictional analysis.

As the attached decision correctly points out, a number of the Commission's precedents indicate that the jurisdictional nature of communications should be determined by the end points of the communication (*i.e.*, by looking at the entire communication as "one call"). I believe this method of evaluating jurisdiction remains valid and important, especially considering the growing number of creative and complex methods for transmitting and transporting communications. Indeed, the challenge of packet networks is that they make it nearly impossible (at present) to trace accurately the route of a single communication to its destination, especially given that each packet of which the communication is comprised may take a different route before reassembling at the intended destination. These and other technological developments will continue to frustrate traditional geographic boundaries.

Our decision that LEC-to-LEC Internet-bound traffic is interstate in nature fundamentally calls into question a number of state decisions that applied reciprocal compensation to LEC-to-LEC Internet-bound traffic based primarily or exclusively on the view, which we herein reject, that this traffic is local. I agree with the majority that this conclusion does not, in itself, dictate how or whether carriers of this traffic should be compensated, nor does this conclusion determine whether this Commission or state commissions should establish compensation arrangements. I likewise agree that not all state decisions to apply reciprocal compensation to this traffic share this basis, and that, as a general matter, there may be other bases upon which state commissions could continue these compensation schemes even after the action we take here.

But even given the fact that our decision today does not necessarily undermine each of the state decisions, I think the most prudent course would have been for us to decline to speculate on what bases there may be for upholding those decisions. The decisions themselves are not before us and it is properly for state authorities to explore the ramifications of our action today on those

ISSUED: June 28, 1999
BY: E.C. Roberts, Jr., President - KY
Louisville, Kentucky

A42. INTEGRATED SERVICES DIGITAL NETWORK (ISDN)

A42.3 BellSouth® Primary Rate ISDN (Cont'd)

A42.3.2 Regulations (Cont'd)

- (M)
- F. The minimum subscription period for which month-to-month BellSouth® Primary Rate ISDN is furnished and for which charges are applicable is one month.
 - G. Unless otherwise specified, the regulations for BellSouth® Primary Rate ISDN stated herein apply in addition to the regulations set forth in Section A2. of this Tariff.
 - H. Customer Premises Equipment (CPE) that is compatible with the BellSouth® Primary Rate ISDN interface is the responsibility of the customer.
 - I. The Company shall not be responsible if changes in any of the equipment, operations, or procedures of the Company utilized in the provisioning of BellSouth® Primary Rate ISDN render any facilities provided by the customer obsolete, or require modification or alteration of such equipment or system, or otherwise affect its use or performance. Digital transmission rates at speeds less than those indicated may be accomplished as a function of the particular CPE furnished by the customer.
 - J. Suspension of service is not allowed.
 - K. Regulations for Allowance of Interruptions apply as specified in Section B2. of the Private Line Services Tariff.
 - L. Service Charges in Section A4. of this Tariff do not apply.
 - M. Hunting rates, Direct Inward Dialing (DID) rates, Customized Code Restriction rates, Selective Class of Call Screening rates, and Foreign Exchange rates do not apply.
 - N. Verification and Emergency Interrupt service is not available.
 - O. Calling telephone numbers transmitted via BellSouth® Primary Rate ISDN are intended solely for the use of the BellSouth® Primary Rate ISDN subscriber. Resale of this information is prohibited by this Tariff except the caller's telephone numbers may be provided to the subscriber's client for those calls sponsored or provided by that client where the client's identity is disclosed to the caller and the client agrees not to distribute such information to others.
 - P. Non-facility Associated Signaling (NFAS) provides the capability to control multiple DS1s with a single D-Channel. This feature can be ordered where switch capabilities exist as stipulated in the vendor technical documentation and where switch capacity exists. When NFAS is selected, the customer will order one BellSouth® Primary Rate ISDN arrangement with one D-Channel and up to 23 B-Channels. Additional BellSouth® Primary Rate ISDN arrangements are ordered with up to 24 B-Channels at rates and charges provided in A42.3.4. The D-Channel activated on the initial arrangement serves the additional BellSouth® Primary Rate ISDN arrangements. If the customer desires, he may also request a back-up D-Channel with the NFAS option. The Voice/Data (Standard) BellSouth® Primary Rate ISDN and Digital Data Only option BellSouth® Primary Rate ISDN arrangements may not be mixed in the same NFAS group.
 - Q. When a customer's normal serving central office is not equipped to provide BellSouth® Primary Rate ISDN, the customer may be served, at the Company's option, from an equipped central office without incurring interoffice channel charges. BellSouth® Primary Rate ISDN customers to be served under this arrangement must sign an agreement that the service may be moved back at the Company's discretion to the normal serving central office and to a probable number change when/if that office is equipped with ISDN. This is referred to as the Alternate Network Serving Arrangement (ANSA). If a customer, under ANSA, requests BellSouth® Primary Rate ISDN from an ISDN equipped central office other than that determined by the Company, interoffice channel charges as specified in A42.3.4.B will apply. Also, if a customer requests BellSouth® Primary Rate ISDN from a central office other than their normal serving office and ANSA does not apply, interoffice channel charges will apply as specified in A42.3.4.B. ANSA does not apply for Inward Data Extended Reach Service.
- (C)

PUBLIC SERVICE COMMISSION
OF KENTUCKY
EFFECTIVE

JUL 28 1999

PURSUANT TO 807 KAR 5:011,
SECTION 9(1)

BY: Stephan Bue
SECRETARY OF THE COMMISSION

Material previously appearing on this page now appears on page(s) 24.1 of this section.

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